

(i)

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 71

DAVID EARL GUTKNECHT,
Petitioner

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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RELEVANT DOCKET ENTRIES

- 3/1/68 Indictment Filed
- 3/11/68 Filed defendant's motion to make more definite and certain or to quash indictment.
- 4/9/68 Filed Order (Neville-Judge) dated 4-8-68 denying defendant's motion to quash, etc.
- 4/16/68 Entered arraignment and plea of not guilty (Devitt, J.)
- 4/18/68 Filed waiver of jury trial with court's approval and parties' signatures.
Entered record of trial-Devitt, Judge
- 4/19/68 Entered record of further trial.
Parties rest.
- 5/10/68 Filed Memorandum Decision and Findings of Fact dated 5-9-68 (Devitt-Judge) finding defendant guilty of crime charged in the indictment.
- 7/15/68 Sentence is imposed. 4 years imprisonment.
- 7/25/68 Filed Notice of Appeal.
-

[Filed March 1, 1968]

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

UNITED STATES OF AMERICA

v.

DAVID EARL GUTKNECHT

4-68 CRIM. 22

INDICTMENT

(50 App. U.S.C. 462)

The United States Grand Jury Charges:

That on or about the 24th day of January, 1968, at the City of Minneapolis, County of Hennepin, in the State and District of Minnesota,

DAVID EARL GUTKNECHT

willfully and knowingly did fail and neglect to perform a duty required of him under and in the execution of the Universal Military Training and Service Act and the rules, regulations and directions duly made pursuant thereto in that he did fail and neglect to comply with an order of his local board to report for and submit to induction into the armed forces of the United States, in violation of Title 50 App., United States Code, Section 462.

A TRUE BILL

/s/ [illegible]
United States Attorney

/s/ W. D. Stevens
Foreman

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

[Caption omitted in printing]

ORDER

The above matter came on for hearing before the undersigned, a judge of the above court, on March 28, 1968, on the motion of defendant for an order quashing the indictment heretofore returned against defendant or in the alternative requiring the United States to make the indictment more definite and certain. Chester A. Bruvold, Esq., 404 WCCO Radio Building, Minneapolis, Minnesota, appeared for defendant in support of said motion and Patrick J. Foley by J. Earl Cudd, Esq., appeared for the United States in opposition thereto. The court has heard the arguments of counsel, has examined the indictment, and on the basis thereof and on all the files, records and proceedings herein,

IT IS ORDERED That the motion of defendant be, and the same hereby is, denied.

It was stipulated into the record in open court by both counsel that the case would be transferred after arraignment and plea to the Third Division of this court for trial. It is so ordered and the clerk of this court is directed to place the case on the April, 1968 Third Division Criminal Calendar for trial.

/s/ Philip Neville
United States District Judge

DATED: April 8, 1968.

MEMORANDUM

Defendant is charged by grand jury indictment with having refused to serve in the armed forces of the United States. More specifically, the indictment in these terms charges in one count that he:

"willfully and knowingly did fail and neglect to perform a duty required of him under and in the execution of the Universal Military Training and Service Act and the rules, regulations and directions duly made pursuant thereto in that he did fail and neglect to comply with an order of his local board to report for and submit to induction into the armed forces of the United States, in violation of Title 50 App., United States Code, Section 462."

Defendant moves the court for an order quashing the indictment herein on the grounds that it fails to state any charge, is contradictory, combines two offenses in one count and is ambiguous.

Rule 8(a) of the Federal Rules of Criminal Procedure provides as follows:

"Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

If in fact the above indictment charges two offenses, they are not set forth in separate counts as Rule 8(a) requires. Defendant's counsel agreed in oral argument before the court, however, that if the indictment had been in two counts, his claimed grievance would disappear.

Rule 14 of the Federal Rules of Criminal Procedure provides in part as follows:

"If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in

an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires."

The prejudice claimed by defendant is his alleged inability to know what charge he must meet at trial.

Defendant has devoted his argument to, and has cited a number of cases bearing on, the question of type of proof available to him when and if he stands trial on this indictment. He states failure and neglect to "submit to" gives greater latitude and a wider scope in proof than does failure and neglect to "report for". For purposes of the pending motion this consideration seems immaterial, though the court does not at this time pass upon and expressly reserves to the trial judge the question of type and quantum of proof available to defendant at the trial. In reality the only issue before the court on the present motion is whether the allegation is duplicitous; that is, are two different offenses alleged in one count to the prejudice of defendant, namely:

1. failure to report for induction
2. failure to submit to induction.

On this issue the court rules against defendant

50 App., United States Code, Section 462 embodies the concept that one who "knowingly fails, neglects or refuses to perform any duty required of him under . . . directions made pursuant to this title . . ." is guilty of an offense. The offense is failure to perform a directed duty. The indictment alleges that defendant failed and neglected "to perform a duty required of him". Under Section 462 this is the offense. This is the cause of his indictment. Section 462 does not contain within it either of the terms "report for" or "submit to". The indictment charges that having received a direction in the form of an order from his selective service board, he owed a duty to comply with it. This states an offense. This is sufficient to uphold the indictment.

The fact that the indictment goes forward to allege two different ways in which it is claimed he failed to perform

this duty does not alter this ruling. It could be alleged that he failed to perform a direction of the selective service board in several different ways. His charged offense, however, is failure to perform the duty required; and each of the ways in which he allegedly failed to do so is not per se a separate crime nor need it be a separate count in an indictment.

Defendant cites to the court *Estep v. United States*, 327 U.S. 114, 66 S.Ct. 423, 90 L.Ed 567 (1946). A quote from that case accords with what has hereinabove been said: (emphasis added)

"By the terms of the Act Congress enlisted the aid of the federal courts only for enforcement purposes. Sec. 11 makes criminal a wilful failure *to perform any duty required* of a registrant by the Act or the rules or regulations made under it. *An order to report for induction is such a duty*; and it includes the duty to submit to induction. *Billings v. Truesdell*, supra, 321 U.S. at page 557, 64 S. Ct. at page 746, 88 L.Ed. 917. Sec. 11 confers jurisdiction on the district courts to try one charged with such offense. But § 11 is silent when it comes to the defenses, if any, which may be interposed."

The fact that section 11 is silent when it comes to the defenses available to a defendant is not grounds for attacking the wording and validity of an indictment. Further, following the philosophy of Rule 14 of the Federal Rules above quoted, it is difficult to see how this ruling in any way prejudices defendant. He will be accorded the broader proof rights at the trial, if a difference there be, so long as both "report for" and "submit to" remain a part of the indictment, as this court now rules by its order that they shall.

What has heretofore been said disposes of defendant's motion to make more definite and certain. The court therefore denies defendant's motion.

EXCERPTS FROM TRANSCRIPT

[9]

* * *

MR. CUDD: Your Honor, the Government will waive its opening statement since I believe in the discussion prior to our convening here I have stated to the Court what I believe the issues are, and I think it will shorten the time. I will call our first witness, Bernard Scheer.

Whereupon,

BERNARD A. SCHEER,

a witness called by and on behalf of the Government, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

(Government's Exhibit 1 marked for identification.)

BY MR. CUDD:

Q. Where do you live, Mr. Scheer? [10] A. At Gaylord, Minnesota.

Q. And what is your business or occupation? A. I am the county veteran service officer and also the Selective Service clerk for Sibley County.

Q. What's the local Board number there? A. 115.

Q. I will show you what has previously been identified as Government's Exhibit 1 and ask you if you recognize that? A. Yes, I do.

Q. And that's a Selective Service file pertaining to whom? A. David Earl Gutnecht.

Q. And are the records—strike that. Is that file and the entries thereunder prepared by you? A. Could I look at this?

Q. Sure. A. Yes, it is.

Q. And do you make the entries in that file pursuant to the Selective Service regulations? A. Yes, I do.

Q. At or about the time that the occurrences indicated therein take place, is that correct? A. Yes.

MR. CUDD: At this time then, Your [11] Honor, we will offer Government's Exhibit Number 1 for identification

into evidence. The Government has previously furnished Mr. Bruvold a Xerox copy.

(Government's Exhibit 1 offered in evidence.)

MR. BRUVOLD: May I make some inquiries, Your Honor?

THE COURT: Sure.

MR. BRUVOLD: Referring to Government Exhibit 1, there are certain numbered circled numbers in the upper right-hand corner, did you place those on there?

THE WITNESS: Yes.

MR. BRUVOLD: They are consecutive and they are used to identify the documents as they were placed in the file?

THE WITNESS: They were when I mailed them in, yes.

MR. BRUVOLD: When you put them in?

THE WITNESS: Yes.

MR. BRUVOLD: You put those numbers on before the file left your office?

THE WITNESS: Right.

MR. BRUVOLD: There are also some [12] other numbers in the lower corners, did you put those on?

THE WITNESS: No. I did not.

MR. BRUVOLD: You did not, But your numbering system is the number of the document in the circled number in the upper right-hand corner?

THE WITNESS: Yes.

MR. BRUVOLD: If your file is complete they should start with number one on those and run through, it would appear number 30 is the last one here?

THE WITNESS: I don't recall which is the last one, but I presume that would be the last one.

MR. BRUVOLD: You presume that would be the last one, number 30?

THE WITNESS: If they are in correct order.

MR. BRUVOLD: And if these papers were out of order in the file you could put them back in the same order by those numbers?

THE WITNESS: Yes, sir.

MR. BRUVOLD: And that is the number and the indication of the rotation of which these papers came into your file down there in Sibley County?

[13] THE WITNESS: Yes. According to the date.

MR. BRUVOLD: According to the date. And on the back of number one there is a certain listing, are you familiar with that listing?

MR. CUDD: Your Honor, I object to this.

MR. BRUVOLD: I just wanted to find out one item on this. Are you familiar with that item one?

THE COURT: Did you finish your objection?

MR. CUDD: Yes, Your Honor, I did. I wanted to object on the grounds that this question does not go to foundation, to the exhibit which, as I understand it, is counsel's purpose in examining at this time.

MR. BRUVOLD: This goes to the question of foundation.

THE COURT: You may answer.

THE WITNESS: What?

MR. BRUVOLD: Is that a listing of dates and events?

THE WITNESS: Yes, it is.

MR. BRUVOLD: And was that listing [14] made by you as part of your duties?

THE WITNESS: As far as I know it was. I am sure it was. I did it myself other than this one probably isn't my writing, I don't think, but I think the girl that works for me occasionally wrote that in for me. I had her write it in.

MR. BRUVOLD: You had a girl that works for you?

THE WITNESS: Well, occasionally she does, and she helps me with my other work, my veterans work and also helps with this.

MR. BRUVOLD: Then of your own knowledge you would say that that listing on that sheet there from your own knowledge is correct?

THE WITNESS: Yes, sir.

MR. BRUVOLD: We have no objections, Your Honor.

THE COURT: Exhibit 1 may be received.

(Government Exhibit 1 received in evidence.)

BY MR. CUDD:

Q. Now, Mr. Scheer, referring you to Government Exhibit 1, would you tell the Court on what date—strike that [15] question. From an examination of Government's Exhibit 1, can you tell me whether an order to report for induction was issued for David Gutnecht? A. Yes, it was.

Q. And on what date was that order issued? A. I don't recall offhand, I mean the date, myself. It would be in the file here.

Q. Can you recall what date the order required Mr. Gutnecht to appear? A. No. I don't recall the date. I mean I just don't.

Q. Well, would you examine the file and see if you can determine that? A. What day he was supposed to appear for induction?

Q. Yes. The date the order required him to appear and also the day the order was issued, please? A. He was ordered to appear on January 24, 1968.

Q. And what date was it, was that order to report for induction mailed? A. On December 26, 1967.

Q. And on January 24, 1968, did he appear at the Selective Service Board in Gaylord, Minnesota? A. Yes, he did.

Q. And from there what happened to him if you know? A. He joined the rest of the group and got on the bus [16] and left for the Federal Building in Minneapolis.

Q. Do you know Mr. Gutnecht, Mr. Scheer? A. I know who he is. I don't know him otherwise.

Q. Do you see him in the courtroom today? A. Yes.

Q. And would you indicate, please. A. Right there.

MR. CUDD: May the record show, Your Honor, that the witness has indicated the defendant David Gutnecht. Any objection, counsel, for the record so showing?

MR. BRUVOLD: There will be no objection as to identification that the David Gutnecht mentioned in the Selective Service Service file, Government Exhibit No. 1, is the defendant in this action.

BY MR. CUDD:

Q. Now, Mr. Scheer, the order to report for induction to which you just referred, that was the document that contains the number 25 in this upper right-hand corner, is that correct? A. Right.

MR. CUDD: I have no further questions, Your Honor.

* * *

[21] Whereupon,

BILLY D. O'NEIL,

a witness called by and on behalf of the Government, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CUDD:

Q. Sergeant, would you state your name, rank and serial number for the record, please? A. Sir, my name is Billy D. O'Neil, rank is Sergeant First Class, and service number is RA17377458.

THE COURT: Again, please, your service number again?

THE WITNESS: Yes, sir, RA17377458.

BY MR. CUDD:

Q. What is your present duty station? A. Sir, my present duty station is in Minneapolis, Minnesota.

Q. And in what specific branch of the armed forces? A. Sir, I am a non-commissioned officer in charge of the processing section at the old Federal Office Building.

Q. That's the armed forces induction station, is that correct? A. Yes, sir. That is correct.

[22] Q. And that's the place where selectees for military service are given physical examinations and processed for induction, is that correct? A. Yes, sir. That is correct.

Q. Now, were you on duty on January 24, 1968? A. Yes, sir. I was on duty.

Q. And did you have occasion to have a conversation with Mr. David Gutnecht? A. Yes, sir.

Q. And do you see Mr. Gutnecht in the courtroom today? A. Yes, sir, I do.

Q. And would you indicate, please? A. (The witness complies.)

MR. CUDD: Your Honor, may the record show that the witness indicated the defendant David Gutnecht?

THE COURT: Absent objection it may.

MR. BRUVOLD: We have no objection.

THE COURT: The second man sitting there, the second man?

THE WITNESS: The second man, sir.

THE COURT: The first man is Mr. Bruvold, the lawyer. Just a moment, if you people all want to stay, you have to be quiet.

BY MR. CUDD:

Q. Now, did you have a conversation with Mr. Gutnecht at this time with reference to processing for induction? A. Yes, sir, I did.

Q. And who was present besides yourself, if anyone? A. Sir, when I first joined up with Mr. Gutnecht, it was at one of the offices where we pass out the induction paper work, and then Mr. Gutnecht indicated to me that he had no intentions to process in any way, such as physical examination or mental.

Q. All right. Now, after he told you that, what did you do, if anything? A. Sir, I escorted Mr. Gutnecht down to Lieutenant Petrie's office.

Q. And what happened there? A. I informed Lieutenant Petrie that Mr. Gutnecht has refused to process either in his physical examination or mental testing.

Q. And did Lieutenant Petrie at that time have a conversation with Mr. Gutnecht? A. Yes, sir. He did.

[24] Q. And who else was present besides Mr. Gutnecht, Lieutenant Petrie and yourself? A. At this time there was only the three of us.

Q. And what conversation—or relate to the Court that conversation that Lieutenant Petrie had with David Gutnecht?

MR. BRUVOLD: I want to object to this at the present time as going—

THE COURT: Maybe you want to stand up when you make your objections.

MR. BRUVOLD: All right. As going beyond the question in the indictment. This witness has established the fact

that Mr. Gutnecht was at the station, at the induction center there and the indictment charges him with failing to be there. I don't think any conversations would be material under the indictment, and I think the charge is limited to that point.

THE COURT: I will receive the testimony subject to your objection. Go ahead, counsel.

BY MR. CUDD:

Q. Would you then relate that conversation that Lieutenant Petrie had with David Gutnecht? A. The conversation went as such: that Lieutenant Petrie informed Mr. Gutnecht of the regulations pertaining to [25] refusal to process for induction.

Q. And did you hear whether he gave him any advice as to the penalties that might ensue? A. Yes, sir.

Q. What did he tell him? A. He informed Mr. Gutnecht that by refusing to be inducted into the service, it could possibly lead to a thousand dollar fine or five years in the penitentiary or both.

(Government Exhibit 2 marked for identification.)

BY MR. CUDD:

Q. Showing you, Sergeant O'Neil, Government Exhibit 2 for identification, I will ask you if you recognize that document? A. Yes, sir. I do.

Q. And where did you first see Government Exhibit 2 for identification? A. This was presented to Lieutenant Petrie in the office.

Q. And presented to Lieutenant Petrie by whom? A. By Mr. David Gutnecht.

Q. Now, on the lower right-hand corner, do you recognize the signature there? A. Yes, sir. I do.

[26] Q. And whose signature is that? A. David Gutnecht's.

MR. BRUVOLD: I am going to object to that as no foundation laid for the identification of the signature and use of the document not in evidence.

THE COURT: I don't think I can hear you. I think if you would stand up. Now I can hear you.

MR. BRUVOLD: I am going to object to the question there, using a document not in evidence and no foundation for the question of the identification of the signatures.

THE COURT: Maybe you want to offer it?

MR. CUDD: Well, Your Honor, I think he misunderstood my question, and I am in the process of laying the foundation. So I will strike the question and move that the answer be also stricken.

THE COURT: It may be stricken.

BY MR. CUDD:

Q. In the very lower right-hand corner, Sergeant, there is a signature, do you recognize that signature? A. Yes, sir. That is my signature.

Q. And it contains your rank and serial number, is [27] that correct? A. Yes, sir. That is correct.

Q. And in the very lower left-hand corner there is another signature. Do you recognize that? A. Yes, sir. That signature is Larry J. Petrie.

MR. BRUVOLD: Your Honor, I move that that be stricken, no foundation for that testimony.

THE COURT: The answer may stand. Next question.

BY MR. CUDD:

Q. Did Lieutenant Petrie sign that, affix his signature to Government Exhibit 2 for identification in your presence? A. Yes, sir. He did.

Q. And you affixed your signature in your presence? A. That is correct, sir.

Q. Now, immediately above the two signatures on Government's Exhibit 2 for identification which you have just testified to, there is some handwriting and a signature there. Do you know how that handwriting got on Government Exhibit 2 for identification? A. Yes, sir. I witnessed David Gutnecht putting this signature there and the statement.

Q. All right. Now, immediately above that there is another signature David Gutnecht, was that placed on [28] Government Exhibit 2 for identification in your presence? A. No, sir. That was signed prior to his giving it to Lieutenant Petrie.

Q. All right.

MR. CUDD: At this time, Your Honor, the Government will offer in evidence Government's Exhibit 2 for identification.

(Government Exhibit 2 offered in evidence.)

MR. BRUVOLD: May I inquire of Government counsel if this is the original of the item that appears in Item 7 of the Selective Service file at page 34?

MR. CUDD: Yes.

MR. BRUVOLD: Then this is already in evidence as a part of the Selective Service file?

MR. CUDD: It is, but I thought I should offer it as a separate exhibit, Your Honor.

THE COURT: Absent objection it may be received.

MR. BRUVOLD: I have no objection then, we have admitted the other.

(Government Exhibit 2 received in evidence.)

[29] BY MR. CUDD:

Q. Now, the sentence and the signature which appears approximately one-third up from the bottom of Government Exhibit 2, to which you have previously testified that Mr. Gutnecht wrote and signed states what, Sergeant?

MR. BRUVOLD: I object to the question, the document will speak for itself.

THE COURT: You may read it. You may tell us.

THE WITNESS: The sentence states, "I refuse to take part in any or all of the prescribed processing. David Gutnecht."

MR. CUDD: I have no further questions, Your Honor.

CROSS EXAMINATION

BY MR. BRUVOLD:

Q. Sergeant O'Neil, have you told us all of the conversations that took place at that time between yourself and

Lieutenant Petrie and David Gutnecht? A. Sir, as far as I can remember, yes.

Q. How large was this room that you were in? A. Nine by twelve approximately. You are talking about the room where three of us were together?

Q. Where the three of you were together. [30] A. Right. Approximately nine by twelve.

Q. Nine feet by twelve feet? A. Yes, sir.

Q. Were there some desks or chairs in this room? A. Yes, sir. There is one desk, one davenport, a couple chairs.

Q. Now, one of your functions at the induction center there is to induct the draftees into the military service, is it not? A. Yes, sir. That is correct.

Q. And the Army has certain prescribed regulations for this, do they not? A. Yes, sir. That is correct.

Q. And are you familiar with those regulations? A. Most of them, sir.

Q. You are familiar with the regulations pertaining to induction? A. Most of it, sir.

Q. Showing you an item numbered 27 in Government Exhibit 1, I believe you testified that you recognized Lieutenant Petrie's signature on a document, did you not? [31] A. Yes, sir.

Q. And on that first part of that item 27, on the second page there, page 33 in the listing, there appears a signature, does there not, Larry J. Petrie? A. Yes, sir.

Q. Would that appear to be his signature? A. Yes, sir.

Q. And have you seen that letter before? A. Yes. I have read it.

Q. You have read it? A. Yes, sir.

Q. And that contains a resume of what transpired at the induction station there? A. Yes, sir.

Q. And that is an accurate resume of it? A. Yes, sir.

Q. You are familiar with Army Regulation 601-270? A. Slightly, sir.

Q. Slightly. Would you be familiar with Section 37 of that if I showed you a copy of it?

MR. CUDD: Your Honor, I will object to this question, the regulation, I think, speaks for itself. It's part of the Code of Federal Regulations [32] with which the Court can take judicial notice.

THE COURT: You may answer the question.

THE WITNESS: The question is am I familiar with this?

BY MR. BRUVOLD:

Q. Are you familiar? A. With the oath of allegiance?

Q. Paragraph 737 of Army Regulation 601-270? A. Paragraph 37 in this oath of allegiance?

Q. The procedure prescribed under Section 37 entitled, "Induction"? A. Yes, sir. I am familiar with the regulation.

Q. And that sets out the regulation in regard to the inducting of persons into the military forces, does it not? A. Yes, sir.

MR. BRUVOLD: I will have the reporter mark a copy of this as Defendant's Exhibit A so I don't have to take it out of the book there.

(Defendant's Exhibit A marked for identification.)

BY MR. BRUVOLD:

Q. Showing you Defendant's Exhibit A so we have no question about it, that appears to be a copy of that page, a [33] duplicate copy of that page? A. Yes, sir. That is.

Q. The one you were just reading? A. Right.

Q. Are you familiar with paragraph 40 of Army Regulation 601-270? You may refresh yourself out of the copies there, particularly with reference to the first paragraph and then paragraph C?

MR. CUDD: Your Honor, the Government will object on the grounds that Army Regulation just cited is irrelevant and immaterial. However, if the Court overrules the

objection, we will stipulate as to the admissibility of the regulation.

THE COURT: Yes. It may be received then. Next question, counsel.

(Defendant's Exhibit A offered and received in evidence.)

BY MR. BRUVOLD:

Q. Just for the record then, so we have it, the next item in the stapled item Defendant's Exhibit A here is a duplicate copy, is it not, appears to be a duplicate copy of Section 40? A. Yes, sir. That's correct.

Q. And that goes on to the next page over here covering [34] Section 40? A. That's right.

Q. And then the last sheet on there is the next sheet under the Section 40? A. Yes. Very same.

MR. BRUVOLD: So then it's stipulated Defendant's Exhibit A may be offered in evidence as a copy of those regulations?

MR. CUDD: Subject to my objection as to materiality and relevancy that's correct, Your Honor.

THE COURT: I will overrule the objection and it may be received. Do you have an extra copy?

MR. BRUVOLD: I have a copy here that the clerk can keep. I have my own copy.

BY MR. BRUVOLD:

Q. Now, Mr.—or Sergeant O'Neil, pardon me—Did Mr. — the defendant Mr. Gutnecht ever appear with the group that was there that morning and was he ever offered as a part of the group that was there on the morning of the 24th, the prescribed induction ceremony and proceedings as outlined under paragraph 37 of Army Regulation 601-270?

[35] Mr. CUDD: Well, Your Honor, to shorten up the matter, we will stipulate he wasn't given the opportunity to take the one step forward, object that the evidence is irrelevant and immaterial.

THE COURT: The stipulation may stand. Next question.

BY MR. BRUVOLD:

Q. Now, when Mr. Gutnecht was in this room with Lieutenant Petrie and yourself, was the statement read to him by you or Lieutenant Petrie, "You are about to be inducted into the armed forces of the United States in the Army, the Navy, the Air Force or the Marine Corps as indicated by the service announced following your name when called. You will take one step forward as your name and service are called and such step will constitute your induction into the armed forces indicated," was this read to him in the room by yourself or Lieutenant Petrie? A. No, sir. That's the last part of the swearing in when a man is inducted into the service. That is done after he has already taken his physical and mental tests, and since he did not accept to take either test this was not read to him.

Q. Paragraph 40 of Army Regulation 601-270, subsection C— A. Paragraph what?

[36] Q. Oh, 14 here is entitled, "Registrants who refuse to submit to induction," is it not? A. Yes, sir. That's correct.

Q. And that would be the regulation that would be applicable in this situation, would it not?

MR. CUDD: I object to that question, Your Honor, as calling for a legal conclusion of the witness.

THE COURT: Sustained.

BY MR. BRUVOLD:

Q. How long have you been at the induction station down there Sergeant O'Neil, in your present capacity or in the capacity you had in January? A. Sir, I have been at the Army exam station for one year and two months.

Q. And what you did in this situation was just follow the practice that you had followed on other occasions on refusals of induction?

MR. CUDD: I object to the question, Your Honor, as being irrelevant, immaterial. He testified as to what he did and what was said on this occasion.

THE COURT: You may answer.

THE WITNESS: Very same procedure, yes.

[37] MR. BRUVOLD: I have no further questions.

MR. CUDD: No further questions, Your Honor.

THE COURT: You may step down, Sergeant. Next witness.

(Witness excused.)

MR. CUDD: Lieutenant Petrie.

[38] Whereupon,

LARRY J. PETRIE,

a witness called by and on behalf of the Government, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CUDD:

Q. Lieutenant, would you state your name, rank and serial number and present duty station for the record, please?

A. Larry James Petrie, Second Lieutenant, United States Army, Serial number 05341626.

Q. Would you please go a little slower for the court reporter who has to record those numbers. Now, Lieutenant Petrie, were you on duty January 24, 1968? A. Yes, sir, I was.

Q. On that occasion, or that day, did you have a conversation with David Gutnecht? A. Yes, sir.

Q. Do you see Mr. Gutnecht in the courtroom? A. Yes, sir.

Q. And would you indicate him, please? A. The second man at the table there.

Q. The one in the green sweater? A. Yes, sir.

[39] MR. CUDD: May the record show, Your Honor, the witness has indicated the defendant David Gutnecht?

MR. BRUVOLD: No objection, Your Honor. We stipulated to it.

BY MR. CUDD:

Q. Now, did you have occasion to have a conversation with Mr. Gutnecht on January 24, 1968. A. Yes, sir.

Q. Who was present at that conversation besides yourself? A. Sergeant O'Neil.

Q. And where did that conversation take place? A. In my office.

Q. And at the induction station? A. On the armed forces examination and entrance station, commonly shortened to induction station.

Q. Who was present besides yourself? A. Sergeant O'Neill and Mr. David Gutnecht.

Q. All right. What did Mr. Gutnecht say to you at that time if anything? A. That he was refusing to cooperate with the Selective Service System by taking tests, physical and mental, for the draft, or words to that effect. That's definitely not an [40] exact quote.

Q. Is that your best recollection of the conversation? A. There was more to it than that that was said, but that is basically what it boiled down to.

Q. At that time did you advise him of any liabilities that he might incur by taking the action that he told you he was going to take? A. Yes, sir. I did.

Q. And what did you advise him? A. That under the Selective Service Act of 1967, refusing to process for induction is a felony. The act may be brought to trial in civil court and if convicted may result in five years imprisonment or \$10,000 fine or both or any combination thereof.

Q. And did you ask him if he understood that? A. Yes, sir.

Q. Showing you Government Exhibit 2, I will ask you if you recognize your signature thereon? A. Yes, sir.

Q. And that's in the lower left-hand corner, is that correct? A. Right, sir.

Q. Now, immediately above there, there is a one-sentence phrase or one sentence and a signature, do you [41] recognize that? A. Yes, sir.

Q. When was that affixed to Government Exhibit 2, if you know? A. That was done in my presence in my office 24 January '68 by Mr. David Gutnecht.

MR. BRUVOLD: Your Honor, I think this is repetitious and it's perfectly agreeable, no question about the statement. This is part of the Selective Service file. I was familiar with it. The Government offered it and I just checked it because I wished to be sure. I think the document speaks for itself.

THE COURT: The answer may stand. Next question.

MR. CUDD: No further questions.

MR. BRUVOLD: I believe Your Honor has the file up there. I will show it to the witness, we can use this one.

CROSS EXAMINATION

BY MR. BRUVOLD:

Q. This is a copy of Item 27 in Government Exhibit 1 and there appears a signature here, "J. Petrie," on that, is [42] that your signature? A. It appears to be. Yes, sir.

Q. And that is a true and accurate resume of what transpired at the induction station at that morning? A. Yes, sir.

Q. You are, in the course of your employment at the induction center there, you are familiar with the government induction regulations? A. More or less. Yes, sir.

Q. You are familiar with paragraph 37 of Army Regulation 601-270? A. Quite, sir.

Q. And you are also familiar with paragraph 40 of Army Regulation 601-270 which deals with processing of registrants and special circumstances? A. Quite, sir, depending on, if that is a posted issue or an older regulation.

Q. And particularly paragraph C, registrants who refuse to submit to induction? A. More or less, sir, yes.

Q. How long have you been employed down there at the induction center? A. I reported in 24 July, '67, sir.

Q. So that's about, last January is about six months [43] then? A. Roughly, sir.

Q. Now, did you state to Mr. Gutnecht or hear stated to him at the induction station, "You are about to be inducted into the armed forces of the United States in the Army, the Navy, the Air Force or the Marine Corps as indi-

cated by the service announced following your name when called. You will take one step forward as your name and service are called and such step will constitute your induction into the armed forces indicated”?

MR. CUDD: Your Honor, I will object to the question on the grounds that it's irrelevant and immaterial on the issue in this case.

THE COURT: You may answer.

THE WITNESS: Can you give me the question for me? Did I say it or hear it said?

BY MR. BRUVOLD:

Q. That's right. Did you say this or hear it said to Mr. Gutnecht? A. No.

MR. BRUVOLD: No further questions, Your Honor.

MR. CUDD: No further questions, Your Honor.

THE COURT: You may step down. All right.

(Witness excused.)

Opinion of the United States District Court
for the District of Minnesota

UNITED STATES DISTRICT COURT

D. Minnesota,
Third Division.

May 9, 1968.

4-68-Cr.-22.

UNITED STATES OF AMERICA,

Plaintiff,

v.

DAVID EARL GUTKNECHT,

Defendant.

MEMORANDUM
&
FINDINGS OF FACT

DEVITT, *Chief Judge:*

In this jury-waived criminal case charging the defendant with violation of the Selective Service Law, the issue as created by the indictment and the defendant's plea of not guilty is whether the government has proved the defendant guilty beyond a reasonable doubt.

The defendant is a 21-year-old resident of Winthrop, Minnesota, and is charged under 50 App., United States Code, § 462 with wilfully and knowingly failing and neglecting to comply with an order of his local Selective Service Board to report for and submit to induction into the armed forces of the United States.

The record shows that the defendant completed and filed the required classification questionnaire (SSS Form No.

100) on January 17, 1966 and was assigned Selective Service No. 21-115-47-162. His draft board, Sibley County, Minnesota Board No. 115, classified him 1-A on February 15, 1966, 2-S on March 15, 1966, and again 2-S on December 21, 1966. The expiration date of the last 2-S classification was October 1, 1967.

On November 23, 1966 the defendant signed and filed a conscientious objection form (SSS Form No. 150). On June 16, 1967 the local board notified the defendant to appear before it on June 21, 1967, at which time the Board would consider his reclassification. On June 21, 1967 he was reclassified 1-A and officially notified of that fact.

The defendant appealed this classification to the State Appeal Board, which, on November 1, 1967, classified him 1-A by a vote of 5 "yes" and 0 "no." The defendant was notified of this action.

On December 20, 1967 Local Board No. 115 declared the defendant delinquent for failure to have in his possession Selective Service Registration card (SSS Form No. 2) and Notice of Classification (SSS Form No. 110). He was advised of this declaration of delinquency on December 21, 1967.

An order to report for induction was mailed to defendant on December 26, 1967, directing him to report for induction at the courthouse at Gaylord, Minnesota, on January 24, 1968 at 6 A.M. He did so report and was transported to the armed forces induction station at Minneapolis, Minnesota.

Upon arrival there the defendant advised Sergeant First Class Billy O'Neil that he would not take part in any induction processing. He was then escorted to the office of the Assistant Processing Officer, Lt. Larry J. Petrie. Petrie advised him that a refusal to process constituted a felony punishable by imprisonment for not more than 5 years

and/or a fine of not more than \$10,000 or both. Defendant advised Petrie that he was aware of the penalty for refusing to process. Defendant then presented to the processing officer a prepared statement containing his reasons for refusal to process for induction.¹ At that time he wrote on the

¹ The defendant said " * * * the Draft and Vietnam war seem to me indefensible. The laws of the Selective Service System are not worthy of obedience. * * * " His complete statement reads:

"To my fellow Americans. Today I am refusing to be inducted into the United States armed forces. This is a result of my decision last fall to return my draft cards and refuse further cooperation with the Selective Service System.

"Conscription seems to me fundamentally authoritarian and anti-democratic. Its coercive attempts to control the lives of young American men are socially disastrous and humanly outrageous. Primarily, the draft functions to supply the manpower necessary for those few holding real political and military power in this country to continue to commit crimes against humanity in waging a cruel and senseless war in Southeast Asia. Both the Draft and the Vietnam war seem to me indefensible. The laws of the Selective Service System are not worthy of obedience. Those who feel that my decision is 'idealistic' and 'impractical' make the mistake of assuming that there can be a real division between morality and politics. Those people who are called 'realists' and compromise on the most crucial of issues, and those who are silent, are furthering the present disastrous course of this country.

"But we are none of us innocent. I am simply asking that each of you examine your thoughts and your actions. As for myself, I shall probably be in prison before too long, and out again after a few years. This is a small price to pay compared to what so many, many American men and Vietnamese men, women, and children have to pay. To those in the military, I ask that you consider resigning or obtaining a discharge. To my fellow young men, in particular, I ask that you find some alternative—any alternative—to military service.

"Many of you will disagree with me; I respect your position, and only ask that you reconsider. Many will agree; I hope that you do as much as you are capable of doing. We have so little time.

/s/ DAVE GUTKNECHT
 "Dave Gutknecht
 January 24, 1968"

statement, "I refuse to take part, or all, (sic) of the prescribed processing," and signed his name.

It was not contended at trial that the defendant's classification was improper. There is a basis in the record for the 1-A classification made by Local Board No. 115.

The essential elements required to be proved by the government are (1) that a lawful order to report for induction on January 24, 1968 was issued by Local Board No. 115; (2) that the defendant refused to obey the order to report for, and submit to, induction; and (3) that the defendant acted wilfully, unlawfully and knowingly.

There is no dispute as to the facts, but the defense offered by the defendant is that (1) the defendant actually did report for induction but was not afforded the opportunity to go through the regular formal induction ceremony prescribed by the pertinent regulations, and until such formal ceremony is afforded him he has not refused induction; and (2) the induction order, while apparently based on non-possession of classification and registration cards, was in fact directed at his anti-Vietnam activities and thus violated his right to free speech.

The defendant urges, in connection with his first defense, that an order to report for induction does not include the duty to submit to induction without proof that the defendant was offered the opportunity to participate in a formal induction ceremony. The defendant urges that regulations AR 601-270, Par. 37 and AR 601-270, Par. 40(c) require that a potential inductee into the armed forces must be afforded an opportunity to take "one step forward" as a signal of his departure from civilian, and entry into military discipline, and that this formal induction ceremony was not afforded the defendant. The defendant urges that a making of the statement,

"You are about to be inducted into the armed forces of the United States, in the Army, the Navy, the Air Force, or the Marine Corps, as indicated by the service announced following your name when called. You will take one step forward as your name and service are called, and such step will constitute your induction into the armed forces indicated,"

was a condition precedent to induction, but that procedure was not followed.

There is no dispute in the record that such was not done, and it appears that the reason is that the "step forward" procedure under the regulations is only to be taken *after* the inductees are given mental and physical tests in order to determine their eligibility for service in the armed forces. This defendant refused to take the physical or mental tests or participate in any other procedure incident to induction.

[1, 2] Here the defendant is not being charged with failure to take "one step forward," but with failure to comply with the Board's order to report for, and submit to, induction. It is clear from the regulations that an order of a draft board to report for induction also encompasses an order to *submit* to induction. 32 C.F.R. § 1632.14, a part of the Selective Service Regulations promulgated by the President under authority of the statute, provides that it is the duty of the registrant upon receiving an order to report for induction to (a) report for induction at the time and place fixed in such order, and (b) to submit to such induction.

This regulation was initially adopted by Executive Order 10001, 13 F.R. 5488, September 21, 1948, amended by Executive Order 10659, 21 F.R. 1103, February 17, 1956,

and by Executive Order 10984, 27 F.R. 200, January 9, 1962.

The Congress of the United States has specifically authorized the President to prescribe these, and other, rules and regulations to carry out the provisions of the Selective Service Act by 50 App. 460(b) (1).

The courts have held that the duty to report for induction contemplates the duty not only to report, but also to submit to induction. *United States v. Collura*, 139 F.2d 345 (2d Cir. 1943). The Supreme Court in *Billings v. Truesdell*, 321 U.S. 542, 64 S.Ct. 737, 88 L.Ed. 917 (1944), said:

"He who reports to the induction station but refuses to be inducted violates § 11 of the Act as clearly as one who refuses to report at all. [Citations omitted.] The order of the Local Board to report for induction includes a command to submit to induction. • • •"

Later the Supreme Court in *Estep v. United States*, 327 U.S. 114, 66 S.Ct. 423, 90 L.Ed. 567 (1946), quoted *Billings v. Truesdell*, supra, as authority for the proposition that an order to report for induction includes the duty to submit to induction. Two subsequent decisions of the Court of Appeals, Ninth Circuit, are to the same effect. *Williams v. United States*, 203 F.2d 85 (1953); *Bradley v. United States*, 218 F.2d 657 (1954).

The defendant argues that a subsequent Ninth Circuit case, *Chernekov v. United States*, 219 F.2d 721 (9th Cir. 1955) is contrary. But it will be observed in reading that case that the facts in it are distinguished from those in *Williams* and *Bradley*.

Defendant's counsel admits that this first defense is a "technical" one. In the court's view, it is not a meritorious one.

[3] Defendant's second defense is that the declaration of delinquency and the direction to report for induction were occasioned by his participation in an anti-Vietnam protest meeting and that the induction order based on such activities violates his right to free speech.

It appears from the Selective Service Board file that on October 16, 1967 the defendant did participate in a "Stop the Draft Week" demonstration at the federal office building in Minneapolis, and that during the demonstration he attempted to turn over his Selective Service card and registration card to a Deputy U. S. Marshal who refused to accept them. The defendant then dropped both cards at the Deputy Marshal's feet, together with mimeographed literature explaining his actions.

There is nothing in the Selective Service file or in any of the evidence received at trial to support the assertion that defendant's classification as a delinquent and order to report for induction were based on his expressions of opposition to the Vietnam war. But on the contrary, it appears that the action of the Selective Service Board was based on the defendant's violation of the regulations that he have the required draft cards in his possession at all times. 32 C.F.R. § 1617.1, 32 C.F.R. § 1623.5. It is not disputed that this defendant did not have his registration certificate (SSS Form No. 2) and his valid notice of classification (SSS Form No. 110) in his possession at all times.

In such circumstances the Selective Service Board was authorized to declare the defendant delinquent and to order

him to report for induction. 32 C.F.R. §§ 1602.4, 1642.4, 1631.7.

[4] But the defendant contends, nevertheless, that the discarding of his draft cards was symbolic conduct in protest to the Vietnam war, and that such conduct is protected by the First Amendment to the United States Constitution. The United States Supreme Court has not passed on that exact question, but two Courts of Appeal have. *United States v. Miller*, 367 F.2d 72 (2d Cir. 1966); *O'Brien v. United States*, 376 F.2d 538 (1st Cir. 1967). In *O'Brien* the court upheld the constitutionality of the regulations authorizing a Selective Service Board to declare delinquent, and order the induction of, persons found to be without possession of the required Selective Service cards, and in *Miller* the court upheld the constitutionality of Section 462(b) (3) which punishes the knowing destruction of draft cards. It is expected that the Supreme Court of the United States may soon pass on the constitutionality of a recently enacted Act making it a crime for a person to burn his draft card. That is a separate crime and not charged here.

Reference was made in the trial to a certain Local Board memorandum issued by National Selective Service System Director Hershey recommending procedures to be followed by local Selective Service Boards in the cases of registrants participating in anti-Vietnam demonstrations. The evidence in the record clearly shows that this defendant was declared delinquent and ordered to report for induction, not by authority of the so-called Hershey memorandum, but because of the defendant's non-possession of the required Selective Service cards in violation of the regulations.

[5] The Court has fully considered the exhibits, the testimony of the witnesses and has judged their credibility. The defendant is clothed with the presumption of innocence and his guilt must be proved beyond a reasonable doubt.

[6] In my view the United States has proved beyond a reasonable doubt every essential element of the crime charged in the indictment and the Court finds the defendant guilty of the crime charged in the indictment. The foregoing expression is intended to comply with Rule 23 of the Federal Rules of Criminal Procedure.

The Probation Officer is directed to prepare a presentence investigation report.

**Opinion of the United States Court of Appeals
for the Eighth Circuit**

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 19,407

UNITED STATES OF AMERICA,

Appellee,

—v.—

DAVID EARL GUTKNECHT,

Appellant.

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MINNESOTA**

[January 20, 1969.]

Before :

MATTHES, GIBSON and LAY,

Circuit Judges.

LAY, Circuit Judge.

Defendant appeals his jury-waived conviction of violation of the Selective Service Law. On June 21, 1967, defendant was classified 1-A by his local draft board after a review of his claimed status as a conscientious objector. Defendant appealed to his state appeal board which, on

November 1, 1967, approved his 1-A classification. On December 20, 1967, his local board declared him delinquent for failure to have in his possession his registration card and classification card. He was ordered to report for induction into the Armed Services on January 24, 1968. On that date he reported to his place of induction but advised army officials he would not take part in any induction processing, including the preliminary physical examination. Defendant was then properly warned of the penalty and at that time gave to the army officers a prepared statement which said in part: "... the Draft and Vietnam War seem to me indefensible. The laws of the Selective Service System are not worthy of obedience. . . ."

The full text of the district court's well-reasoned opinion is found in 283 F.Supp. 945. We affirm. Defendant, relying upon *Chernekov v. United States*, 219 F.2d 721 (9 Cir. 1955), asserts that the letter of the law was not carried out in that he actually did report for induction but was not afforded the opportunity to go through the regular formal induction ceremony. The defendant additionally complains that the indictment was "duplicitious" in that it stated two different offenses in one count, to-wit, failure to report and failure to submit to induction. Defendant urges that the phraseology of the indictment requires the government to prove *both* charges beyond a reasonable doubt or fail to convict.

As the district court relates, the United States Supreme Court in *Billings v. Truesdell*, 321 U.S. 542, 557 (1944) has answered these arguments:

"It must be remembered that §11 imposes on a selectee a criminal penalty for any failure 'to perform any duty required of him under or in the execution' of the Act 'or the rules or regulations made pursuant thereto.'

He who reports to the induction station but refuses to be inducted violates §11 of the Act as clearly as one who refuses to report at all [cite omitted]. The order of the local board to report for induction includes a command to submit to induction. Though that command was formerly implied, it is now express."

On October 16, 1967, defendant participated in a "Stop-the-Draft-Week" demonstration in Minneapolis. He dropped his Selective Service registration card as well as his classification card at the Deputy United States Marshal's feet. He attached with them a mimeograph explanation of his action. On December 20, 1967, the defendant was declared delinquent by his local board for failure to have possession of his registration card and his notice of classification. Immediately thereafter defendant was ordered to report for induction on January 24, 1968.

Defendant now claims that he was being unlawfully punished for his political views on the Vietnam War and states that the board's punitive action was in violation of his First Amendment rights. The district court, however, found that there was no evidence at trial to support defendant's contention that his delinquency order was based upon his political views. The district court found that the delinquency order was based upon the defendant's violation of the regulation that he have the required cards in his possession at all times. 32 C.F.R. §§ 1617.1 and 1623.5. The district court found that the delinquency order and the order for induction were therefore authorized under 32 C.F.R. §§ 1602.4, 1642.4 and 1631.7.

By placing his draft certificates beyond "continuing availability," Gutknecht "wilfully frustrated [a] governmental interest." It is now settled that such frustration was

"non-communicative" and is not protected by First Amendment principles. *United States v. O'Brien*, 391 U.S. 367 (1968).

Moreover, we are not confronted with an illegal reclassification which revokes a statutory exemption, as in *Oesterreich v. Selective Service System Local Board No. 11*, 37 U.S.L.W. 4053 (U.S.Sup.Ct. 1968). Although found delinquent by the local board on December 20, 1967, the order of delinquency did not relate to a reclassification. Defendant had been classified 1-A since June 21, 1967. Defendant makes no claim upon appeal that his 1-A classification was not based on evidence or that he was denied fair administrative procedures in regard to his classification. Admittedly, defendant's induction date was advanced pursuant to Tit. 50 U.S.C. § 456(h)(1) which gives priority of induction to "delinquents." The regulations (32 C.F.R. § 1631.7) specify the order of induction based upon a specified priority of status of all persons having 1-A or 1-A-O status. This priority is administratively created. We know of no legal reason why the order of call cannot be administratively altered as long as it is done "impartially" without discrimination. Congress has authorized:

"The selection of persons for training and service . . . shall be made in an *impartial manner, under such rules and regulations as the President may prescribe*, from the persons who are liable for such training and service and who at the time of selection are registered and classified, *but not deferred or exempted . . .*" (Emphasis ours.) Tit. 50 U.S.C. § 455(a)(1).

We emphasize we are not confronted here with a reclassification which has no basis in fact or which attempts to

deprive the defendant of any existing statutory exemption or deferment.

The board is given certain administrative discretion in carrying out congressional policy. This discretion should be upheld as long as it is reasonably related to a governmental interest and is not otherwise exercised unlawfully. In the instant case the board's regulation concerning possession of the registration card is a reasonable one and related to government interests. See *United States v. O'Brien*, *supra*. The board's self-promulgated definition of "delinquency" is not unreasonable when its effect does not otherwise punish an individual by depriving him of a right given him by statute. It is only "that use of delinquency" which is proscribed by the *Oestereich* case. Here the defendant does not claim any kind of deferment, let alone exemption. Involved here is the order of call for induction of those already classified 1-A. Since the order of call is governed by regulation (1631.7) reasonable conditions may be administratively attached to it. Although a local board may not arbitrarily or discriminatorily abuse the order of call,¹ if it is reasonably and impartially administered there can exist no legal fault in its administrative handling.

To establish irregularity in the board's findings of "delinquency," the adjudicated effect of the board's action becomes the relevant test. Here the defendant is not deprived of either statutory exemption or deferment; here the board gave notice to him that he was delinquent under its regulations for failure to have his certificate; here he was given a reasonable period to correct this delinquency; here he had statutory notice that he was subject to be drafted ahead of those in the "prime age group." Defen-

¹ Cf. *United States v. Lybrand*, 279 F.Supp. 74 (E.D. N.Y. 1967).

dant's right to be called in order was one which had been given only by administrative grace and which had been reasonably conditioned upon overall compliance with the Selective Service laws. The evidence is clear that defendant violated these laws. Under these circumstances induction of the defendant was not lawless or irregular.

Judgment affirmed.

STATE HEADQUARTERS
SELECTIVE SERVICE SYSTEM

100 East Tenth Street
Saint Paul, Minnesota 55101

17 October 1967

REGISTERED MAIL

Mr. George Hollingsworth
Special Agent, FBI
392 New United States Courthouse
Minneapolis, Minnesota 55401

Dear Mr. Hollingsworth:

In accordance with your request of this date enclosed are three Notices of Classification (SSS Form 110) and one Registration Certificate (SSS Form 2) for the following:

David M. Ponce	(SSS Form 110)
21-51-46-765	
David Earl Gutknecht	(SSS Form 2)
21-115-47-162	(SSS Form 110)
Terry Zane Munn	(SSS Form 110)
41-31-44-1035	

Sincerely yours,

EDWARD P. BARROWS
Colonel, JAGC
Deputy State Director

EPB:ss

Enclosures: 4

cc: Col. Knight

19 October 1967

Mr. George Hollingsworth
Special Agent, FBI
392 New United States Courthouse
Minneapolis, Minnesota 55401

Re: Gutknecht, David Earl
SSN 21-115-47-162

Dear Mr. Hollingsworth:

This letter is to supplement previous correspondence and to inform you that David Earl Gutknecht is registered with Selective Service Local Board No. 115, Sibley County, Gaylord, Minnesota. This registration was accomplished on 20 December 1965.

David Gutknecht's date of birth is 9 December 1947. He has filed SSS Form 150, a special form for conscientious objectors, with the local board. His file is currently before the Minnesota Appeal Board for adjudication.

Enclosed for your use is a copy of a letter dated 16 October 1967 from the Hennepin County Selective Service Chief Clerk, Mr. Merrill J. McCabe

Sincerely yours,

EDWARD P. BARROWS
Colonel, JAGC
Deputy State Director

Enclosure
EPB/mka
cc: U. S. Attorney
Colonel Knight

Colonel Knight
John Roberts, SA

UNITED STATES DEPARTMENT OF JUSTICE

FEDERAL BUREAU OF INVESTIGATION
392 Federal Building U. S. Court House
110 South Fourth Street
Minneapolis, Minnesota 55401

October 24, 1967

In Reply, Please Refer to
File No. 25-10726

Edward P. Barrows
Colonel, JAGC
Deputy State Director
Selective Service System
100 East Tenth Street
St. Paul, Minnesota 55101

Dear Colonel Barrows:

Re: Gutknecht, David Earl
Selective Service Number
21-115-47-162

Reference is made to your letter dated October 19, 1967 with an enclosure of a letter dated October 16, 1967 from Mr. Merrill J. McCabe which sets forth that Gutknecht's file is currently before the Minnesota Appeal Board for adjudication.

This office is currently conducting an investigation relative to Gutknecht dropping his draft card at the Federal Office Building on the morning of October 16, 1967.

It would be greatly appreciated if Gutknecht's Selective Service file could be reviewed, and Special Agent George Hollingsworth of this office will appear at your headquarters October 25, 1967.

Very truly yours,

/s/ Richard G. Held
Special Agent in Charge

UNITED STATES DEPARTMENT OF JUSTICE

UNITED STATES ATTORNEY
DISTRICT OF MINNESOTA
596 U.S. COURTHOUSE
MINNEAPOLIS, MINNESOTA 55401

Address Reply to
United States Attorney
and Refer to
Initials and Numbers
JEC:dmp

November 16, 1967

Colonel Edward P. Barrows
Deputy State Director
Selective Service System
100 East Tenth Street
St. Paul, Minnesota 55101

Re: David Earl Gutknecht
Selective Service Number
21-115-47-162

Dear Colonel Barrows:

On October 16, 1967, the above-captioned individual participated in a demonstration at the Federal Office Building, Minneapolis, Minnesota, in connection with "Stop the Draft Week."

During the demonstration, he attempted to turn over his Selective Service card and registration card to a deputy United States Marshal who refused to accept them. He then dropped both cards at the deputy's feet together with mimeographed literature explaining his actions.

In the mimeographed literature dropped by Gutknecht he stated that his application for classification as a conscientious objector was to be destroyed.

An agent of the Federal Bureau of Investigation attempted to interview Gutknecht at the Twin Cities Information Cen-

ter, 1822 Fourth Avenue South, Minneapolis. He, however, refused to sign the Waiver of Rights form and refused to make any statement.

The above information is furnished your office for your consideration in the light of Selective Service regulations. Would you please advise us of any action taken by you in the matter so that we will be able to make a prosecutive decision on the above-captioned individual's failure to possess a certificate of registration and a valid notice of classification.

Very truly yours,

/s/ PATRICK J. FOLEY
United States Attorney

By: J. EARL CUDD, Assistant
United States Attorney

SELECTIVE SERVICE SYSTEM
DELINQUENCY NOTICE

Approval
 Post Receipt



23

LOCAL BOARD NO. 115
Sibley County
Court House
Gaylord, Minnesota

(Local Board Stamp)

Dec. 20, 1967

(Date Delivered Subsequent)

Dec. 21, 1967

(Date of Mailing)

To **David** **Karl** **Outkrocht**

(First)

(Middle)

(Last)

Address **524** **12th** **Ave. S.E.**

(Street and Number or RFD Route)

Minneapolis, Minn. 55414

(City, Town, or Village)

(County)

(State)

(ZIP Code)

SELECTIVE SERVICE NO.

21

115

37

162

1. You are hereby notified that this Local Board has declared you to be a delinquent because of your failure to perform the following duty or duties required of you under the selective service law: **For failure to comply with 1617.1 and 1623.5, of the Selective Service regulations which requires every registrant to have in his possession at all times a Selective Service Registration Card, SSS Form No. 2 and Notice of Classification, SSS Form No. 110, which has been issued to him by his local board.**

Valid evidence has been submitted to his local board which sets forth the facts that you have not, at all times and do not now have in your possession a Registration Certificate, SSS Form No. 2 and Notice of Classification, SSS Form No. 110, issued to you by this local board.

2. You are hereby directed to report to this Local Board immediately in person or by mail, or to take this notice to the Local Board nearest you for advice as to what you should do.

3. Your willful failure to perform the foregoing duty or duties is a violation of the Universal Military Training and Service Act as amended, which is punishable by imprisonment for as much as 5 years or a fine of as much as \$10,000, or by both such fine and imprisonment. You may be classified in class I-A as a delinquent and ordered to report for induction.

James F. Kuhlke
 (Member or Clerk of Local Board)

INSTRUCTIONS

A Delinquency Notice (SSS Form 304) shall be prepared by the Local Board whenever it declares the registrant to be a delinquent because of his failure to perform any duty or duties required of him other than failure to comply with an Order to Report for Induction (SSS Form 232), or an Order to Report for Civilian Work and Statement of Employer (SSS Form 153). This notice shall be prepared in triplicate, and the specific duty or duties which the registrant has failed to perform shall be described in detail in the space provided. The Local Board shall (a) mail the original to the registrant at his last known address, (b) file a copy in the registrant's Cover Sheet (SSS Form 101), and (c) mail a copy to the State Director of Selective Service.

Supreme Court of the United States

No. 1176 -----, October Term, 19 68

David Earl Gutknecht,

Petitioner,

v.

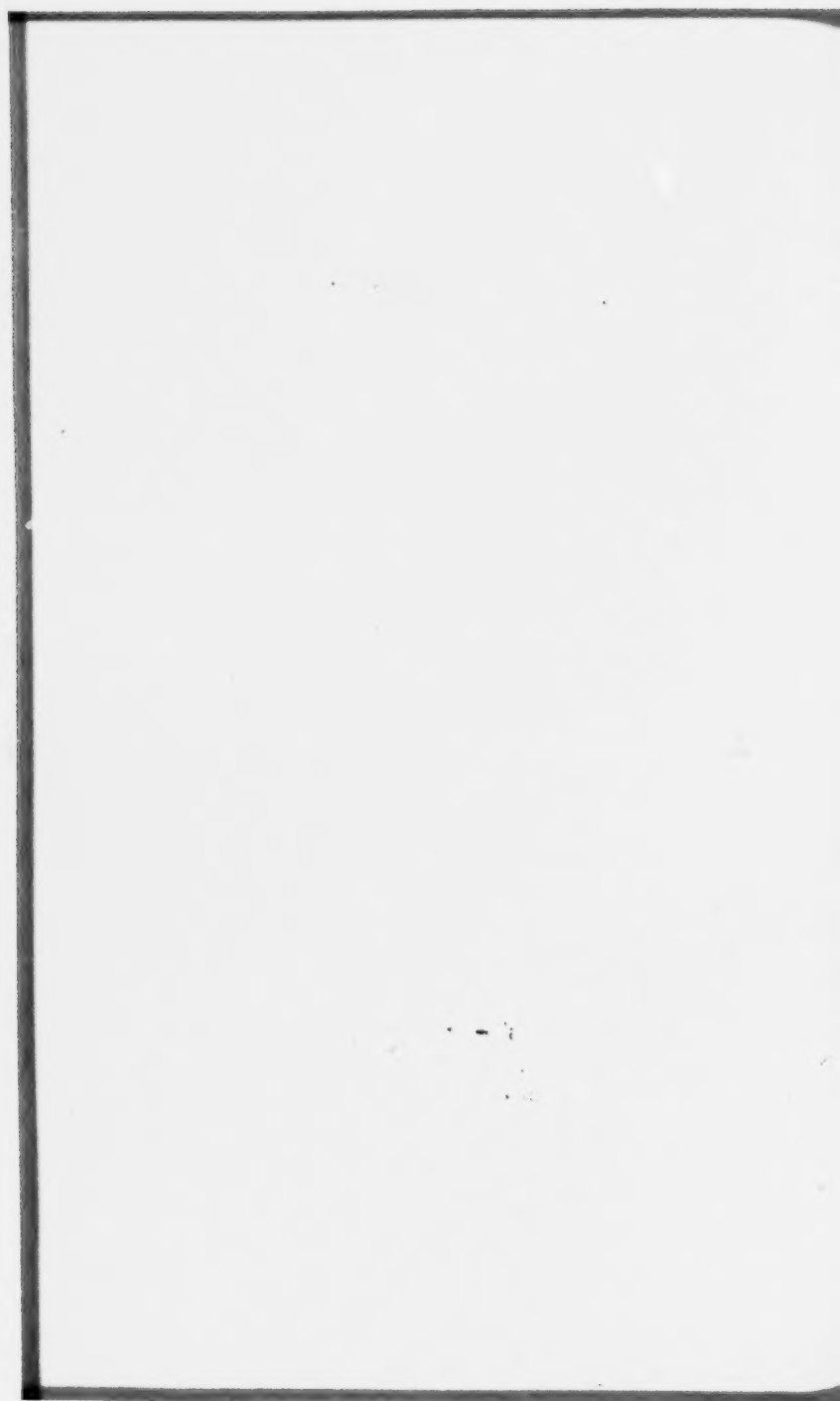
United States

ORDER ALLOWING CERTIORARI. Filed April 26 -----, 19 69

The petition herein for a writ of certiorari to the United States Court of

Appeals for the Eighth ----- Circuit is granted. The case
is placed on the summary calendar and set for oral argument
immediately following No. 1144.

And it is further ordered that the duly certified copy of the transcript of
the proceedings below which accompanied the petition shall be treated as though
filed in response to such writ.



FILE COPY

FILED

MAR 19 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [REDACTED]

71

DAVID EARL GUTKNECHT,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1968

No.

DAVID EARL GUTKNECHT,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled case on January 20, 1969.

Opinions Below

The decision of the Court of Appeals is unreported. It is set out in the Appendix, *infra*, pp. 17-22. The memorandum and findings of fact of the district court is reported at 283 F. Supp. 945 and is set out in Appendix, *infra*, pp. 23-31.

Jurisdiction

The judgment of the Court of Appeals was entered on January 20, 1969. On February 11, 1969, Mr. Justice White entered an order extending until March 21, 1969, the time for filing this petition for certiorari. Jurisdiction is conferred on this Court by 28 U. S. C. §1254(1).

Questions Presented

1. Petitioner was classified I-A in June, 1967, at which time he was nineteen years old. He returned his Selective Service Registration Certificate and Notice of Classification to the government in October, 1967, as a statement of protest against the war in Vietnam. On December 21, 1967, petitioner was declared delinquent for failure to possess his draft cards and on December 26, 1967 he was sent an order to report for induction on January 24, 1968. He was subsequently convicted of failing "to report for and submit to induction." Under these circumstances:

a. Does the declaration of delinquency and the priority induction order issued to petitioner for failure to have his Registration Certificate and Notice of Classification in his personal possession, violate the due process clause of the Fifth Amendment, the Sixth Amendment, the Military Selective Service Act of 1967, and the Selective Service Regulations?

b. Do Selective Service Regulations 1617.1 and 1623.5, as construed and applied in this case, and Selective Service Regulation 1642.4 on its face, violate the First Amendment?

2. Whether the government proved that petitioner failed "to report for and submit to induction" when it was con-

ceded he had reported and also conceded that the prescribed procedure for submitting was not followed.

3. Whether petitioner's motion under Rule 12(b)(2), Fed. R. Cr. P., for duplicity in the indictment was improperly denied.

Statutes and Regulations Involved

Military Selective Service Act of 1967, Sec. 12(a); 50 App. U. S. C. Sec. 652(a), is set out in the Appendix, *infra*, pp. 32-33.

Selective Service Regulation 1642.4; 32 CFR Sec. 1642.4, is set out in the Appendix, *infra*, pp. 33-34.

Selective Service Regulation 1631.7; 32 CFR Sec. 1631.7, is set out in the Appendix, *infra*, pp. 34-36.

Selective Service Regulation 1617.1; 32 CFR Sec. 1617.1, is set out in the Appendix, *infra*, pp. 36-37.

Selective Service Regulation 1623.5; 32 CFR Sec. 1623.5, is set out in the Appendix, *infra*, p. 37.

Army Regulation 601-270, para. 37, is set out in the Appendix, *infra*, pp. 37-40.

Army Regulation 601-270, para. 40(c), is set out in the Appendix, *infra*, pp. 40-42.

Statement of the Case¹

Petitioner registered with Selective Service Local Board No. 115, Gaylord, Minnesota, on December 20, 1965, a few days after his eighteenth birthday. He was classified I-A on February 15, 1966, and reclassified II-S (student) on March 15, 1966. On June 21, 1967 petitioner was again classified I-A after he had notified his Local Board, by letter dated May 15, 1967, that he was no longer a student.

On November 23, 1966, petitioner had filed an application with his Local Board for exemption as a conscientious objector under Section 6(j) of the Universal Military Service and Training Act (subsequently renamed the Military Selective Service Act of 1967, and hereafter called "the Act"). The application for conscientious objector status was denied by the Local Board on June 21, 1967, and petitioner duly noted his appeal to the State Appeal Board on July 20, 1967.

On October 16, 1967, as part of a nation-wide protest against the war in Vietnam, petitioner surrendered his Registration Certificate (SSS Form 2) and Notice of Classification (SSS Form 110) by leaving them on the steps of the Federal Building in Minneapolis with a statement explaining the basis of his protest. On the same date petitioner's Registration Certificate and Notice of Classifica-

¹ Except for those facts which are supported by references to the transcript of trial (designated by the symbol "T"), the Statement of the Case is based upon the contents of petitioner's Selective Service file which was introduced at trial as Government Exhibit No. 1.

tion were sent to the Minnesota State Director of Selective Service, and on the following day were sent to the Minneapolis office of the Federal Bureau of Investigation at its request.

On October 24, 1967, Local Board Memorandum No. 85 was issued by the Selective Service System (Defendant's Exh. B; App., *infra*, p. 45) and on October 26, 1967 General Lewis B. Hershey, Director of the Selective Service System issued a special letter (Defendant's Exh. C; App. *infra*, p. 43), which encouraged the reclassification of registrants who surrendered their Selective Service documents or who engaged in a variety of other actions thought by General Hershey to be disruptive of the Selective Service System or not in the national interest.

On November 22, 1967, the Minnesota State Director's office notified Local Board No. 115 that petitioner's conscientious objector appeal was denied. On November 27, 1967, petitioner was sent a Notice of Classification advising him of the Appeal Board decision and notifying him again that he was I-A.

On December 21, 1967, petitioner was sent a Delinquency Notice (SSS Form 304) which stated that he had been declared delinquent for failing to have his Registration Certificate and Notice of Classification in his possession.

Five days later, on December 26, 1967, petitioner was sent an order to report for induction (SSS Form 252) on January 24, 1968.

On January 24, 1968, petitioner appeared at Local Board No. 115 pursuant to the order to report for induction (T. 15) where "he joined the rest of the group and got on the

bus and left for the Federal Building in Minneapolis" (T. 15-16).

At the induction center in Minneapolis, petitioner "indicated" to the military personnel there that "he had no intentions to process in any way, such as physical examination or mental" (T. 23). He was then informed "of the regulations pertaining to refusal to process for induction" (T. 24-25) and informed of the penalties for "refusing to be inducted into the service . . ." (T. 25, 40). Petitioner was not given the opportunity to take the one step forward, as prescribed by Army Regulation 601-270(37)(1) nor was the statement of imminent induction, also required by Army Regulations 601-270(37)(1), ever read to him (T. 35, 43). Petitioner signed a statement that said "I refuse to take part in any or all of the prescribed processing" (T. 29).

In March 1968, petitioner was indicted in the following terms:

"That on or about the 24th day of January, 1968, at the City of Minneapolis, County of Hennepin, in the State and District of Minnesota, DAVID EARL GUTKNECHT willfully and knowingly did fail and neglect to perform a duty required of him under and in the execution of the Universal Military Training and Service Act and the rules, regulations and directions duly made pursuant thereto in that he did fail and neglect to comply with an order of his local board to report for and submit to induction into the armed forces of the United States, in violation of Title 50 App., United States Code, Section 462."

He was tried without a jury, found guilty, and sentenced to four years' imprisonment. The conviction was affirmed by the Court of Appeals on January 20, 1969. The court held that petitioner's surrender of his draft cards was not protected by the First Amendment, following *O'Brien v. United States*, 391 U. S. 367 (1968), that his accelerated induction as a delinquent was not "lawless or irregular," and that the facts alleged in the indictment had been proved.

Reasons for Granting the Writ

1. **Certiorari should be granted in this case to determine the statutory and constitutional validity of the delinquency regulation and practice under the Military Selective Service Act of 1967.**

In this criminal case, the issue of pre-induction judicial review under Section 10(b)(3) of the Military Selective Service Act, which has been and is now before the Court in a variety of cases,² is not present. Neither is the question of delinquency reclassification present in this case as it is in the cases cited in note 3, *supra*, for petitioner here was already classified I-A at the time he was declared delinquent. The consequence of that declaration was to subject him to priority induction under Reg. 1631.7, the so-called "order of call" regulation. App., *infra*, pp. 34-36.

What is starkly present in this case, therefore, is the validity of the delinquency procedures under Reg. 1642.4.

² *Oestereich v. Selective Service Board*, 37 U. S. L. Week 4053; *Breen v. Selective Service*, No. 1144; *Kolden v. Selective Service*, No. —.

Furthermore, that validity must be examined in this case in light of the peaceful political protest activity which generated the invocation of those procedures.

The "order of call" established by Reg. 1631.7 has been described as "a matter of substance central to the present statutory scheme of the Selective Service System." *United States v. Lybrand*, 279 F. Supp. 74, 78 (E. D. N. Y. 1967). The President, the Congress and the people are "all agreed that some clear system for determining order of selection must be maintained." *Ibid*.

The significance of petitioner's priority induction is obvious. At the time he was declared delinquent he was only nineteen. If not declared delinquent, he would have been subject to call only under subsection (3) of Reg. 1631.7, as a non-volunteer with older men up to age twenty-six being selected first.

The record does not show when petitioner might have been called had he not been declared delinquent. Having been declared delinquent, however, he was deprived of any possibility otherwise available to have sought a classification other than I-A. For example, he might have taken a job which would have entitled him to an occupational deferment under Section 6(h)(2) of the Act, or he might have enrolled as a divinity student and been eligible for a Section 6(g) exemption. But being declared delinquent, he was immediately deprived of the opportunity to exercise any of those options or others which might have been open to him.

Under these circumstances, the Court should decide the following important questions of federal law relating to

the delinquency procedures which have not been but should be settled.

a. The Court should settle the important question whether petitioner's declaration of delinquency and priority induction was punishment, see *Kennedy v. Mendoza-Martinez*, 372 U. S. 144 (1963), and, if so, whether those procedures violate the due process clause of the Fifth Amendment and the provisions of the Sixth Amendment.

For brevity's sake, petitioner will not repeat in detail the *Mendoza-Martinez* argument. It was presented at length to the Court in *Oestereich*, it was described by Mr. Justice Harlan in his concurring opinion in *Oestereich* as "non-frivolous," *supra*, at 4056, n. 6, and was conceded by the government in its *Oestereich* brief to be a "serious constitutional question" (p. 49). The *Mendoza-Martinez* issue is set out in more detail at pp. 15-17 of the petition for certiorari in *Breen v. Selective Service*, No. 1144, this Term, and petitioner incorporates that material by reference here.

There is need only for one additional observation. Where delinquency is linked to reclassification, a registrant at least has the opportunity, under the Selective Service System hearing and appellate procedure (Regs. Parts 1624-1627), to try to persuade administrative officers to return his initial deferred or exempt classification. Petitioner, however, having been classified I-A at the time of his declaration of delinquency, was deprived even of that marginal benefit. Indeed, he was issued an order to report for induction only five days after his delinquency notice was mailed to him and he was therefore effectively denied even the right to act upon the invitation printed on the delinquency notice "to report to this local board immediately in

person or by mail, or . . . take this notice to the local board nearest you for advice as to what you should do." Five days is hardly a reasonable time to respond, particularly when three of those days consisted of a long Christmas weekend. See *In re Gault*, 387 U. S. 1, 32-33 (1967).

b. Certiorari should be granted to settle the important question whether petitioner's declaration of delinquency and priority induction is authorized by the Military Selective Service Act of 1967 or the Selective Service Regulations.

In its brief in *Oestereich*, the government conceded grave doubts concerning the validity of the delinquency procedures (p. 54):

"It is difficult to believe that Congress intended the local boards to have the unfettered discretion to decide that any violation of the Act or regulations warrants a declaration of delinquency, reclassification and induction, regardless of its relationship to the individual's status as exempt or deferred or whatever. Congress prescribed criminal prosecution for such violations, and also provided for exemptions and deferments for certain classes of individuals to reflect considerations of national interest apart from simply raising manpower for the Army. Termination of such status through delinquency reclassification may effectively undermine that congressional determination and thus be inconsistent with the Selective Service Act."

The government also granted that the unfettered discretion given to local boards under Reg. 1642.4(c) to restore a registrant's prior classification presented a serious ques-

tion whether the regulations did not conflict with the Act (pp. 54-55). The possibility of constitutional infirmities was also recognized by the government including the delegation of power to local boards "without standards for the exercise of sweeping discretion given them by the regulations," and the "absence of any specified nexus or reasonable relationship between the violation which triggers reclassification and induction, and the registrant's status vis-à-vis the Selective Service System [which] might be viewed as inconsistent with due process notions." (p. 56.)

The government also referred not unfavorably to the opinion of Judge Dooling in *United States v. Eisdorfer*, 1 S. S. L. R. 3115 (E. D. N. Y. 1968), in which he observed that "The delinquency regulations, moreover, disregard the structure of the Act; deferments and priorities-of-induction, adopted in the public interest, are treated as if they were forfeitable personal privileges." *Id.* at 3116.

This Court in *Oestereich* recognized that "Congress did not define delinquency; nor did it provide any standards for its definition by the Selective Service System." *Supra* at 4054. The Court found, of course, that to whatever use the delinquency regulations might be put, revocation of statutory exemptions was not one of them. And, added the Court, "Even if Congress had authorized the Boards to revoke statutory exemptions by means of delinquency classification, serious questions would arise if Congress were silent and did not prescribe standards to govern the Boards' actions." *Ibid.*

It is apparent, therefore, that there are serious and unresolved statutory and constitutional issues present which should be settled by this Court in this case where a

registrant was sentenced to four years imprisonment under a very dubious administrative practice.

In addition, there are important issues of federal law involved in the question whether petitioner's delinquency and priority induction are authorized by the Selective Service Regulations themselves. Petitioner respectfully refers the Court to pp. 18-21 of the petition for certiorari in *Breen v. Selective Service*, No. 1144, this Term, where this argument is set forth.

c. Certiorari should be granted to settle the important question whether Reg. 1642.4, upon which petitioner's delinquency and priority induction are based, is vague and overbroad.

d. Certiorari should be granted to settle the important question whether petitioner's surrender of his draft cards was conduct protected by the First Amendment.

The reasons for granting the writ to review the issues in Sec. 1 (c) and (d) are identical to the reasons set forth at pp. 21-26 of the petition for certiorari in *Breen v. Selective Service*, No. 1144, this Term. Petitioner, for brevity's sake, respectfully refers the Court to that material.

2. Certiorari should be granted because the decision of the Court below, relating to the question whether petitioner was given the opportunity to submit to induction, is in conflict with the decision of the Ninth Circuit in *Chernekov v. United States*, 219 F. 2d 721 (1955).

The essence of the charge against petitioner was that "he did fail and neglect to comply with an order of his local board to report for and submit to induction."

The record is plain, and the courts below and the government acknowledge, that petitioner did "report" for induc-

tion and that he was not given the opportunity to "submit" as prescribed by Army Regulations. The issue in dispute, therefore, is whether his conviction for failing "to report for and submit to induction" can stand.³

The procedure regulating the induction process is set forth in precise detail in Army Regulation 601-270.⁴ Paragraph 37(a) provides that "all registrants" will be assembled and informed "of the imminence of induction, quoting the following: . . ." The quote which follows informs the group that "they will take one step forward as your name and service are called and such step will constitute your induction into the Armed Forces indicated." Paragraph 37(a)(2) provides for the quiet and courteous removal of any registrant who fails to take the requisite step forward.

Paragraph 40(c) sets out the procedure to be followed with registrants who refuse to submit to induction and who have been removed from the group under paragraph 37(a)(2). Any such registrant is to be informed that his refusal to submit is a felony subject to 5 years imprisonment and a \$10,000 fine, or both; he will again be informed of the imminence of induction by the language specified in paragraph 37(a)(1) and given a second chance to take one step forward. If he again refuses, the registrant will be requested to sign a statement saying "I refuse to be inducted into the Armed Forces of the United States." He is then free to go (though in some federal judicial districts a registrant who refuses to submit is arrested on the spot).

³ Prior to trial, petitioner moved to quash the indictment for duplicity but the motion was denied. Petitioner preserves this claim should certiorari be granted, but does not now argue it.

⁴ Induction centers are under the control and operation of the armed forces. Selective Service Regs. 1602.7, 1632.14(b), 1632.15(e).

None of this procedure was followed in petitioner's case. Rather, after properly reporting for induction, he notified the military personnel at the induction center that "he had no intentions to process in any way, such as physical examination or mental" (T. 23). Though informed of the penalties for refusing induction, petitioner was not given the opportunity to refuse under the explicit prescribed procedure of AR 601-270.

The court below barely discussed this issue. To the extent that it did, it relied on perfectly ambiguous language from *Billings v. Truesdell*, 321 U. S. 542, 557 (1944). The district court's opinion, which treated the issue to a slightly greater extent, is equally unilluminating. That opinion recognizes that petitioner was charged in the conjunctive, and though it acknowledges that petitioner did report and was not given the opportunity to submit, it concludes that "an order of a draft board to report for induction also encompasses an order to *submit* to induction." App., *infra*, p. 27. That, with deference, rather begs the question because, not having been given the opportunity to submit under AR 601-270, petitioner cannot be said to have disobeyed the draft board's order which "also encompasses an order to *submit* to induction."

The decision of the Eight Circuit is in conflict with the decision of the Ninth Circuit in *Chernekov v. United States*, 219 F. 2d 721 (1955). The defendant there was not given the opportunity to step forward under the predecessor (but substantially equivalent) regulation to AR 601-270,⁵ because "he had said he would not if asked to do so step forward and become inducted into the Armed

⁵ The predecessor Army Regulation, 615-180-1, is set out at 219 F. 2d at 724, n. 12.

Forces." 219 F. 2d at 725. The Ninth Circuit, in reversing the conviction, said:

"It does not matter that he might not have changed his mind. He should have been given the opportunity granted him by the Army's own regulations to seriously reflect and to let actions speak louder than words. . . . [I]t is highly important that the moment a selectee becomes subject to military authority be marked with certainty. It is also important that the moment he becomes liable for civil prosecution be marked with certainty. The special regulation fulfills such a need." *Ibid.*

This conflict between *Chernekov* and the case at bar should be settled by this Court in order to make perfectly clear what the respective obligations of registrants and armed forces personnel are at the induction center. We urge, of course, that the *Chernekov* rule is the sound rule for it eliminates any ambiguity about the intentions of a prospective draftee.*

* It may be that petitioner, if chargeable with any crime, could be charged under Sec. 12(a) of the Military Selective Service Act for violating Reg. 1632.14(4): "to obey the orders of the representatives of the Armed Forces while at the place where his induction will be accomplished," for his alleged refusal "to process in any way, such as physical examination or mental" (T. 23). Of course there is no evidence that he in fact refused "to process." There is only his alleged statement that he would not. Following *Chernekov*, one would think a registrant could not be so charged unless first confronted with a physician or the papers for the mental tests.

The Army Regulations bear out this interpretation. AR 601-270 (40)(c)(4) makes distinct provision for inductees who refuse to take the preinduction tests and examinations. Such persons "will be informed that failure to submit to such examination . . . is a violation of Selective Service Regulations and punishable as such."

CONCLUSION

For the reasons stated above, certiorari should be granted.

Respectfully submitted,

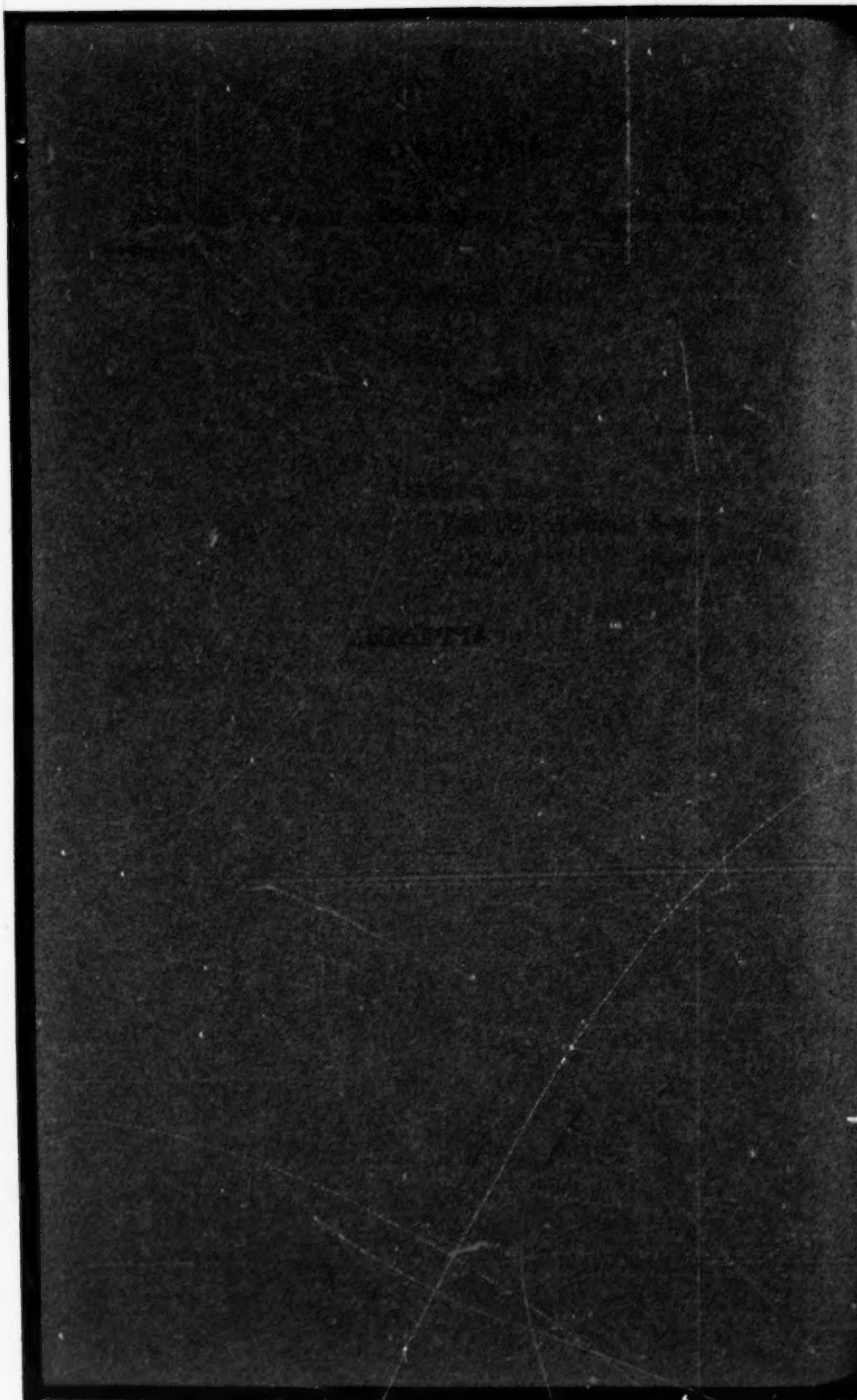
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March 19, 1969.

APPENDIX



APPENDIX

**Opinion of the United States Court of Appeals
for the Eighth Circuit**

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 19,407

UNITED STATES OF AMERICA,

Appellee,

—v.—

DAVID EARL GUTKNECHT,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MINNESOTA

[January 20, 1969.]

Before:

MATTHES, GIBSON and LAY,

Circuit Judges.

LAY, *Circuit Judge.*

Defendant appeals his jury-waived conviction of violation of the Selective Service Law. On June 21, 1967, defendant was classified 1-A by his local draft board after a review of his claimed status as a conscientious objector. Defendant appealed to his state appeal board which, on

November 1, 1967, approved his 1-A classification. On December 20, 1967, his local board declared him delinquent for failure to have in his possession his registration card and classification card. He was ordered to report for induction into the Armed Services on January 24, 1968. On that date he reported to his place of induction but advised army officials he would not take part in any induction processing, including the preliminary physical examination. Defendant was then properly warned of the penalty and at that time gave to the army officers a prepared statement which said in part: "... the Draft and Vietnam War seem to me indefensible. The laws of the Selective Service System are not worthy of obedience. . . ."

The full text of the district court's well-reasoned opinion is found in 283 F.Supp. 945. We affirm. Defendant, relying upon *Chernekoff v. United States*, 219 F.2d 721 (9 Cir. 1955), asserts that the letter of the law was not carried out in that he actually did report for induction but was not afforded the opportunity to go through the regular formal induction ceremony. The defendant additionally complains that the indictment was "duplicitious" in that it stated two different offenses in one count, to-wit, failure to report and failure to submit to induction. Defendant urges that the phraseology of the indictment requires the government to prove *both* charges beyond a reasonable doubt or fail to convict.

As the district court relates, the United States Supreme Court in *Billings v. Truesdell*, 321 U.S. 542, 557 (1944) has answered these arguments:

"It must be remembered that §11 imposes on a selectee a criminal penalty for any failure 'to perform any duty required of him under or in the execution' of the Act 'or the rules or regulations made pursuant thereto.'

He who reports to the induction station but refuses to be inducted violates §11 of the Act as clearly as one who refuses to report at all [cite omitted]. The order of the local board to report for induction includes a command to submit to induction. Though that command was formerly implied, it is now express."

On October 16, 1967, defendant participated in a "Stop-the-Draft-Week" demonstration in Minneapolis. He dropped his Selective Service registration card as well as his classification card at the Deputy United States Marshal's feet. He attached with them a mimeograph explanation of his action. On December 20, 1967, the defendant was declared delinquent by his local board for failure to have possession of his registration card and his notice of classification. Immediately thereafter defendant was ordered to report for induction on January 24, 1968.

Defendant now claims that he was being unlawfully punished for his political views on the Vietnam War and states that the board's punitive action was in violation of his First Amendment rights. The district court, however, found that there was no evidence at trial to support defendant's contention that his delinquency order was based upon his political views. The district court found that the delinquency order was based upon the defendant's violation of the regulation that he have the required cards in his possession at all times. 32 C.F.R. §§ 1617.1 and 1623.5. The district court found that the delinquency order and the order for induction were therefore authorized under 32 C.F.R. §§ 1602.4, 1642.4 and 1631.7.

By placing his draft certificates beyond "continuing availability," Gutknecht "wilfully frustrated [a] governmental interest." It is now settled that such frustration was

"non-communicative" and is not protected by First Amendment principles. *United States v. O'Brien*, 391 U.S. 367 (1968).

Moreover, we are not confronted with an illegal reclassification which revokes a statutory exemption, as in *Oesterreich v. Selective Service System Local Board No. 11*, 37 U.S.L.W. 4053 (U.S.Sup.Ct. 1968). Although found delinquent by the local board on December 20, 1967, the order of delinquency did not relate to a reclassification. Defendant had been classified 1-A since June 21, 1967. Defendant makes no claim upon appeal that his 1-A classification was not based on evidence or that he was denied fair administrative procedures in regard to his classification. Admittedly, defendant's induction date was advanced pursuant to Tit. 50 U.S.C. § 456(h)(1) which gives priority of induction to "delinquents." The regulations (32 C.F.R. § 1631.7) specify the order of induction based upon a specified priority of status of all persons having 1-A or 1-A-O status. This priority is administratively created. We know of no legal reason why the order of call cannot be administratively altered as long as it is done "impartially" without discrimination. Congress has authorized:

"The selection of persons for training and service . . . shall be made in an *impartial manner*, under such rules and regulations as the President may prescribe, from the persons who are liable for such training and service and who at the time of selection are registered and classified, but not deferred or exempted . . ."
(Emphasis ours.) Tit. 50 U.S.C. § 455(a)(1).

We emphasize we are not confronted here with a reclassification which has no basis in fact or which attempts to

deprive the defendant of any existing statutory exemption or deferment.

The board is given certain administrative discretion in carrying out congressional policy. This discretion should be upheld as long as it is reasonably related to a governmental interest and is not otherwise exercised unlawfully. In the instant case the board's regulation concerning possession of the registration card is a reasonable one and related to government interests. See *United States v. O'Brien, supra*. The board's self-promulgated definition of "delinquency" is not unreasonable when its effect does not otherwise punish an individual by depriving him of a right given him by statute. It is only "that use of delinquency" which is proscribed by the *Oestereich* case. Here the defendant does not claim any kind of deferment, let alone exemption. Involved here is the order of call for induction of those already classified 1-A. Since the order of call is governed by regulation (1631.7) reasonable conditions may be administratively attached to it. Although a local board may not arbitrarily or discriminatorily abuse the order of call,¹ if it is reasonably and impartially administered there can exist no legal fault in its administrative handling.

To establish irregularity in the board's findings of "delinquency," the adjudicated effect of the board's action becomes the relevant test. Here the defendant is not deprived of either statutory exemption or deferment; here the board gave notice to him that he was delinquent under its regulations for failure to have his certificate; here he was given a reasonable period to correct this delinquency; here he had statutory notice that he was subject to be drafted ahead of those in the "prime age group." Defen-

¹ Cf. *United States v. Lybrand*, 279 F.Supp. 74 (E.D. N.Y. 1967).

dant's right to be called in order was one which had been given only by administrative grace and which had been reasonably conditioned upon overall compliance with the Selective Service laws. The evidence is clear that defendant violated these laws. Under these circumstances induction of the defendant was not lawless or irregular.

Judgment affirmed.

**Opinion of the United States District Court
for the District of Minnesota**

UNITED STATES DISTRICT COURT

D. Minnesota,
Third Division.

May 9, 1968.

4-68-Cr.-22.

UNITED STATES OF AMERICA,

Plaintiff,

v.

DAVID EARL GUTKNECHT,

Defendant.

MEMORANDUM
&
FINDINGS OF FACT

DEVITT, *Chief Judge:*

In this jury-waived criminal case charging the defendant with violation of the Selective Service Law, the issue as created by the indictment and the defendant's plea of not guilty is whether the government has proved the defendant guilty beyond a reasonable doubt.

The defendant is a 21-year-old resident of Winthrop, Minnesota, and is charged under 50 App., United States Code, § 462 with wilfully and knowingly failing and neglecting to comply with an order of his local Selective Service Board to report for and submit to induction into the armed forces of the United States.

The record shows that the defendant completed and filed the required classification questionnaire (SSS Form No.

100) on January 17, 1966 and was assigned Selective Service No. 21-115-47-162. His draft board, Sibley County, Minnesota Board No. 115, classified him 1-A on February 15, 1966, 2-S on March 15, 1966, and again 2-S on December 21, 1966. The expiration date of the last 2-S classification was October 1, 1967.

On November 23, 1966 the defendant signed and filed a conscientious objection form (SSS Form No. 150). On June 16, 1967 the local board notified the defendant to appear before it on June 21, 1967, at which time the Board would consider his reclassification. On June 21, 1967 he was reclassified 1-A and officially notified of that fact.

The defendant appealed this classification to the State Appeal Board, which, on November 1, 1967, classified him 1-A by a vote of 5 "yes" and 0 "no." The defendant was notified of this action.

On December 20, 1967 Local Board No. 115 declared the defendant delinquent for failure to have in his possession Selective Service Registration card (SSS Form No. 2) and Notice of Classification (SSS Form No. 110). He was advised of this declaration of delinquency on December 21, 1967.

An order to report for induction was mailed to defendant on December 26, 1967, directing him to report for induction at the courthouse at Gaylord, Minnesota, on January 24, 1968 at 6 A.M. He did so report and was transported to the armed forces induction station at Minneapolis, Minnesota.

Upon arrival there the defendant advised Sergeant First Class Billy O'Neil that he would not take part in any induction processing. He was then escorted to the office of the Assistant Processing Officer, Lt. Larry J. Petrie. Petrie advised him that a refusal to process constituted a felony punishable by imprisonment for not more than 5 years

and/or a fine of not more than \$10,000 or both. Defendant advised Petrie that he was aware of the penalty for refusing to process. Defendant then presented to the processing officer a prepared statement containing his reasons for refusal to process for induction.¹ At that time he wrote on the

¹ The defendant said " * * * the Draft and Vietnam war seem to me indefensible. The laws of the Selective Service System are not worthy of obedience. * * * " His complete statement reads:

"To my fellow Americans. Today I am refusing to be inducted into the United States armed forces. This is a result of my decision last fall to return my draft cards and refuse further cooperation with the Selective Service System.

"Conscription seems to me fundamentally authoritarian and anti-democratic. Its coercive attempts to control the lives of young American men are socially disastrous and humanly outrageous. Primarily, the draft functions to supply the manpower necessary for those few holding real political and military power in this country to continue to commit crimes against humanity in waging a cruel and senseless war in Southeast Asia. Both the Draft and the Vietnam war seem to me indefensible. The laws of the Selective Service System are not worthy of obedience. Those who feel that my decision is 'idealistic' and 'impractical' make the mistake of assuming that there can be a real division between morality and politics. Those people who are called 'realists' and compromise on the most crucial of issues, and those who are silent, are furthering the present disastrous course of this country.

"But we are none of us innocent. I am simply asking that each of you examine your thoughts and your actions. As for myself, I shall probably be in prison before too long, and out again after a few years. This is a small price to pay compared to what so many, many American men and Vietnamese men, women, and children have to pay. To those in the military, I ask that you consider resigning or obtaining a discharge. To my fellow young men, in particular, I ask that you find some alternative—any alternative—to military service.

"Many of you will disagree with me; I respect your position, and only ask that you reconsider. Many will agree; I hope that you do as much as you are capable of doing. We have so little time.

/s/ DAVE GUTKNECHT
 "Dave Gutknecht
 January 24, 1968"

statement, "I refuse to take part, or all, (sic) of the prescribed processing," and signed his name.

It was not contended at trial that the defendant's classification was improper. There is a basis in the record for the 1-A classification made by Local Board No. 115.

The essential elements required to be proved by the government are (1) that a lawful order to report for induction on January 24, 1968 was issued by Local Board No. 115; (2) that the defendant refused to obey the order to report for, and submit to, induction; and (3) that the defendant acted wilfully, unlawfully and knowingly.

There is no dispute as to the facts, but the defense offered by the defendant is that (1) the defendant actually did report for induction but was not afforded the opportunity to go through the regular formal induction ceremony prescribed by the pertinent regulations, and until such formal ceremony is afforded him he has not refused induction; and (2) the induction order, while apparently based on non-possession of classification and registration cards, was in fact directed at his anti-Vietnam activities and thus violated his right to free speech.

The defendant urges, in connection with his first defense, that an order to report for induction does not include the duty to submit to induction without proof that the defendant was offered the opportunity to participate in a formal induction ceremony. The defendant urges that regulations AR 601-270, Par. 37 and AR 601-270, Par. 40(c) require that a potential inductee into the armed forces must be afforded an opportunity to take "one step forward" as a signal of his departure from civilian, and entry into military discipline, and that this formal induction ceremony was not afforded the defendant. The defendant urges that a making of the statement,

"You are about to be inducted into the armed forces of the United States, in the Army, the Navy, the Air Force, or the Marine Corps, as indicated by the service announced following your name when called. You will take one step forward as your name and service are called, and such step will constitute your induction into the armed forces indicated."

was a condition precedent to induction, but that procedure was not followed.

There is no dispute in the record that such was not done, and it appears that the reason is that the "step forward" procedure under the regulations is only to be taken *after* the inductees are given mental and physical tests in order to determine their eligibility for service in the armed forces. This defendant refused to take the physical or mental tests or participate in any other procedure incident to induction.

[1, 2] Here the defendant is not being charged with failure to take "one step forward," but with failure to comply with the Board's order to report for, and submit to, induction. It is clear from the regulations that an order of a draft board to report for induction also encompasses an order to *submit* to induction. 32 C.F.R. § 1632.14, a part of the Selective Service Regulations promulgated by the President under authority of the statute, provides that it is the duty of the registrant upon receiving an order to report for induction to (a) report for induction at the time and place fixed in such order, and (b) to submit to such induction.

This regulation was initially adopted by Executive Order 10001, 13 F.R. 5488, September 21, 1948, amended by Executive Order 10659, 21 F.R. 1103, February 17, 1956,

and by Executive Order 10984, 27 F.R. 200, January 9, 1962.

The Congress of the United States has specifically authorized the President to prescribe these, and other, rules and regulations to carry out the provisions of the Selective Service Act by 50 App. 460(b) (1).

The courts have held that the duty to report for induction contemplates the duty not only to report, but also to submit to induction. *United States v. Collura*, 139 F.2d 345 (2d Cir. 1943). The Supreme Court in *Billings v. Truesdell*, 321 U.S. 542, 64 S.Ct. 737, 88 L.Ed. 917 (1944), said:

"He who reports to the induction station but refuses to be inducted violates § 11 of the Act as clearly as one who refuses to report at all. [Citations omitted.] The order of the Local Board to report for induction includes a command to submit to induction. * * *

Later the Supreme Court in *Estep v. United States*, 327 U.S. 114, 66 S.Ct. 423, 90 L.Ed. 567 (1946), quoted *Billings v. Truesdell*, supra, as authority for the proposition that an order to report for induction includes the duty to submit to induction. Two subsequent decisions of the Court of Appeals, Ninth Circuit, are to the same effect. *Williams v. United States*, 203 F.2d 85 (1953); *Bradley v. United States*, 218 F.2d 657 (1954).

The defendant argues that a subsequent Ninth Circuit case, *Chernekov v. United States*, 219 F.2d 721 (9th Cir. 1955) is contrary. But it will be observed in reading that case that the facts in it are distinguished from those in *Williams* and *Bradley*.

Defendant's counsel admits that this first defense is a "technical" one. In the court's view, it is not a meritorious one.

[3] Defendant's second defense is that the declaration of delinquency and the direction to report for induction were occasioned by his participation in an anti-Vietnam protest meeting and that the induction order based on such activities violates his right to free speech.

It appears from the Selective Service Board file that on October 16, 1967 the defendant did participate in a "Stop the Draft Week" demonstration at the federal office building in Minneapolis, and that during the demonstration he attempted to turn over his Selective Service card and registration card to a Deputy U. S. Marshal who refused to accept them. The defendant then dropped both cards at the Deputy Marshal's feet, together with mimeographed literature explaining his actions.

There is nothing in the Selective Service file or in any of the evidence received at trial to support the assertion that defendant's classification as a delinquent and order to report for induction were based on his expressions of opposition to the Vietnam war. But on the contrary, it appears that the action of the Selective Service Board was based on the defendant's violation of the regulations that he have the required draft cards in his possession at all times. 32 C.F.R. § 1617.1, 32 C.F.R. § 1623.5. It is not disputed that this defendant did not have his registration certificate (SSS Form No. 2) and his valid notice of classification (SSS Form No. 110) in his possession at all times.

In such circumstances the Selective Service Board was authorized to declare the defendant delinquent and to order

him to report for induction. 32 C.F.R. §§ 1602.4, 1642.4, 1631.7.

[4] But the defendant contends, nevertheless, that the discarding of his draft cards was symbolic conduct in protest to the Vietnam war, and that such conduct is protected by the First Amendment to the United States Constitution. The United States Supreme Court has not passed on that exact question, but two Courts of Appeal have. *United States v. Miller*, 367 F.2d 72 (2d Cir. 1966); *O'Brien v. United States*, 376 F.2d 538 (1st Cir. 1967). In *O'Brien* the court upheld the constitutionality of the regulations authorizing a Selective Service Board to declare delinquent, and order the induction of, persons found to be without possession of the required Selective Service cards, and in *Miller* the court upheld the constitutionality of Section 462(b) (3) which punishes the knowing destruction of draft cards. It is expected that the Supreme Court of the United States may soon pass on the constitutionality of a recently enacted Act making it a crime for a person to burn his draft card. That is a separate crime and not charged here.

Reference was made in the trial to a certain Local Board memorandum issued by National Selective Service System Director Hershey recommending procedures to be followed by local Selective Service Boards in the cases of registrants participating in anti-Vietnam demonstrations. The evidence in the record clearly shows that this defendant was declared delinquent and ordered to report for induction, not by authority of the so-called Hershey memorandum, but because of the defendant's non-possession of the required Selective Service cards in violation of the regulations.

[5] The Court has fully considered the exhibits, the testimony of the witnesses and has judged their credibility. The defendant is clothed with the presumption of innocence and his guilt must be proved beyond a reasonable doubt.

[6] In my view the United States has proved beyond a reasonable doubt every essential element of the crime charged in the indictment and the Court finds the defendant guilty of the crime charged in the indictment. The foregoing expression is intended to comply with Rule 23 of the Federal Rules of Criminal Procedure.

The Probation Officer is directed to prepare a presentence investigation report.

Military Selective Service Act of 1967

Sec. 12. *Penalties.*—(a) Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said title, rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate regarding or bearing upon a classification or in support of any request for a particular classification, for service under the provisions of this title, or rules, regulations, or directions made pursuant thereto, or who otherwise evades or refuses registration or service in the armed forces or any of the requirements of this title, or who knowingly counsels, aids, or abets another to refuse or evade registration or service in the armed forces or any of the requirements of this title, or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title, or any person or persons who shall knowingly hinder or interfere or attempt to do so in any way, by force or violence or otherwise, with the administration of this title or the rules or regulations made pursuant thereto, or who conspires to commit any one or more of such offenses, shall, upon conviction

in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than \$10,000, or by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on conviction, shall suffer such punishment as a court martial may direct. No person shall be tried by court martial in any case arising under this title unless such person has been actually inducted for the training and service prescribed under this title or unless he is subject to trial by court martial under laws in force prior to the enactment of this title. Precedence shall be given by courts to the trial of cases arising under this title, and such cases shall be advanced on the docket for immediate hearing, and an appeal from the decision or decree of any United States district court or United States court of appeals shall take precedence over all other cases pending before the court to which the case has been referred.

Selective Service Regulations

1642.4 *Declaration of delinquency status and removal therefrom.*

(a) Whenever a registrant has failed to perform any duty or duties required of him under the selective service law other than the duty to comply with an Order to Report for Induction (SSS Form No. 252) or the duty to comply with an Order to Report for Civilian Work and Statement of Employer (SSS Form No. 153), the local board may declare him to be a delinquent.

(b) When the local board declares a registrant to be a delinquent, it shall enter a record of such action and the

date thereof on the registrant's Classification Questionnaire (SSS Form No. 100) and shall complete a Delinquency Notice (SSS Form No. 304), in duplicate, setting forth the duty or duties which the registrant has failed to perform. The local board shall mail the original to the registrant at his last known address and file the copy in his Cover Sheet (SSS Form No. 101).

(c) A registrant who has been declared to be a delinquent may be removed from that status by the local board at any time. When the local board removes a registrant from delinquency status, it shall enter a record of such action and the date thereof on the registrant's Classification Questionnaire (SSS Form No. 100) and shall advise the registrant of such removal by letter a copy of which shall be filed in his Cover Sheet (SSS Form No. 101).

1631.7 *Action by Local Board Upon Receipt of Notice of Call.*—(a) When a call is placed without designation of age group or groups, each local board, upon receiving a Notice of Call on Local Board (SSS Form 201) from the State Director of Selective Service (1) for a specified number of men to be delivered for induction, or (2) for a specified number of men in a medical, dental, or allied specialist category to be delivered for induction, shall select and order to report for induction the number of men required to fill the call from among its registrants who have been classified in Class I-A and Class I-A-O and have been found acceptable for service in the Armed Forces and to whom the local board has mailed a Statement of Acceptability (DD Form 62) at least 21 days before the date fixed for induction: *Provided*, That a registrant classified in Class I-A or Class I-A-O who is a delinquent may be selected and ordered to report for induction to fill

an induction call notwithstanding the fact that he has not been found acceptable for service in the Armed Forces and has not been mailed a Statement of Acceptability (DD Form 62); *And provided further*, That a registrant classified in Class I-A or Class I-A-O who has volunteered for induction may be selected and ordered to report for induction notwithstanding the fact that he has not been found acceptable for service in the Armed Forces and regardless of whether or not a Statement of Acceptability (DD Form 62) has been mailed to him. Such registrants, including those in a medical, dental, or allied specialist category, shall be selected and ordered to report for induction in the following order:

- (1) Delinquents who have attained the age of 19 years in the order of their dates of birth with the oldest being selected first.
- (2) Volunteers who have not attained the age of 26 years in the sequence in which they have volunteered for induction.
- (3) Nonvolunteers who have attained the age of 19 years and have not attained the age of 26 years and who (A) do not have a wife with whom they maintain a bona fide family relationship in their homes, in the order of their dates of birth with the oldest being selected first, or (B) have a wife whom they married after the effective date (August 26, 1965) of this amended subparagraph and with whom they maintain a bona fide family relationship in their homes, in the order of their dates of birth with the oldest being selected first.
- (4) Nonvolunteers who have attained the age of 19 years and have not attained the age of 26 years and

who have a wife whom they married on or before the effective date (August 26, 1965) of this amended subparagraph and with whom they maintain a bona fide family relationship in their homes, in the order of their dates of birth with the oldest being selected first.

(5) Nonvolunteers who have attained the age of 26 years in the order of their date of birth with the youngest being selected first.

(6) Nonvolunteers who have attained the age of 18 years and 6 months and who have not attained the age of 19 years in the order of their dates of birth with the oldest being selected first.

In selecting registrants in the order of their dates of birth, if two or more registrants have the same date of birth they shall, as among themselves, be selected in alphabetical order.

1617.1 *Effect of failure to have unaltered registration certificate in personal possession.*—Every person required to present himself for and submit to registration must, after he has registered, have in his personal possession at all times his Registration Certificate (SSS Form 2) prepared by his local board which has not been altered and on which no notation duly and validly inscribed thereon has been changed in any manner after its preparation by the local board. The failure of any person to have his Registration Certificate (SSS Form 2) in his personal possession shall be prima facie evidence of his failure to register. When a registrant is inducted into the armed forces or enters upon active duty in the armed forces,

other than active duty for training only or active duty for the sole purpose of undergoing a physical examination, he shall surrender his Registration Certificate (SSS Form 2) to the commanding officer of the joint examining and induction station or to the responsible officer at the place to which he reports for active duty, and such certificate shall be destroyed by the officer to whom it is surrendered.

1623.5 Persons Required To Have Notice of Classification (SSS Form 110) in Personal Possession.—Every person who has been classified by a local board must have in his personal possession at all times, in addition to his Registration Certificate (SSS Form 2), a valid Notice of Classification (SSS Form 110) issued to him showing his current classification. When any such person is inducted into the armed forces or enters upon active duty in the armed forces, other than active duty for training only or active duty for the sole purpose of undergoing a physical examination, he shall surrender his Notice of Classification (SSS Form 110) to the commanding officer of the joint

examining and induction station or to the responsible officer at the place to which he reports for active duty, who shall destroy such notice.

Army Regulations

AR 601-270

37. Induction. a. The following procedure will be followed in the induction of all registrants into the Armed Forces:

- (1) Registrants who have been determined to be fully qualified for induction in all respects will be as-

sembled. The induction officer will inform them of the imminence of induction, quoting the following:

"You are about to be inducted into the Armed Forces of the United States, in the Army, the Navy, the Air Force, or the Marine Corps, as indicated by the service announced following your name when called. You will take one step forward as your name and service are called and such step will constitute your induction into the Armed Forces indicated."

- (2) Any registrant who fails or refuses to step forward when his name is called will be removed quietly and courteously from the presence of the group about to be inducted and processed as prescribed in paragraph 40c.
- (3) A commissioned officer or warrant officer then will call the roll and the foregoing procedure will be carried out. All who have stepped forward will be informed that each and every one of them is a member of the Armed Forces concerned, using the language exactly as quoted:

"You have now been inducted into the Armed Forces of the United States indicated when your name was called. Each one of you is now a member of the Armed Forces concerned, and amenable to the regulations and the Uniform Code of Military Justice and all other applicable laws and regulations."

b. Oath of allegiance ceremony. The oath of allegiance is not a part of induction. Registrants who have been inducted will be informed that the taking of ceremonial oath

of allegiance is not a part of induction. The oath will be administered by any commissioned officer of any Armed Force as soon after the induction as practicable. In every instance there will be an appreciable break to insure that the taking of the ceremonial oath does not appear to be any part of the induction. The oath may be administered at any location as prescribed by the service in which inducted. If a nondeclarant alien is a member of the newly inducted group, the officer will explain the difference between the ceremonial oath of allegiance and the ceremonial oath of service and obedience.

(1) The oath of allegiance reads as follows:

"I, _____, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign or domestic; that I will bear true faith and allegiance to the same; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to regulations and the Uniform Code of Military Justice. So help me God."

(2) In the event a nondeclarant alien does not desire to take the oath of allegiance, he may be administered the following oath of service and obedience, which oath will be substituted for the oath described in (1) above.

"I, _____, a citizen of _____ and without intention of surrendering such citizenship, do solemnly swear (or affirm) that I will serve the United States honestly and faithfully against all their enemies whomsoever, and that I will obey

the orders of the President of the United States and orders of the officers appointed over me, according to regulations and the Uniform Code of Military Justice."

- (3) An inductee who refuses to subscribe to the oath of allegiance or the oath of service and obedience, whichever is appropriate, will be advised that he is already a member of the United States Army, Navy, Air Force, or Marine Corps, whichever is appropriate. For such an inductee DA Form 873 (Certificate of Clearance and/or Security Determination) will be prepared as provided in paragraph 112.

40. *Processing steps for registrants in special categories.*

c. Registrants who refuse to submit to induction. Any registrant who has been removed from the group as prescribed in paragraph 37a(2) and who persists in his refusal to submit to induction will be informed that such refusal constitutes a felony under the provisions of the Universal Military Training and Service Act, as amended. He will be informed further that conviction of such an offense under civil proceedings will subject him to be punished by imprisonment for not more than 5 years, or a fine of not more than \$10,000, or both. He will then be informed again of the imminence of induction using the language specified in paragraph 37a(1) and his name and service number again will be called. If he steps forward at this time, he will be informed that he is a member of the Armed Forces concerned, using the language specified in paragraph 37a(3). If, however, he persists in refusing to be inducted, the following action will be taken:

- (1) The registrant will be requested, but not required, to make a signed statement, dated, in his own handwriting, as follows: "I refuse to be inducted into the Armed Forces of the United States." Such statement should be witnessed by at least two witnesses who will affix their signatures to the statement. Registrants who refuse induction will not be furnished any means of transportation.
- (2) Letter of notification or refusal to submit to induction will be prepared in quadruplicate. The original, together with the voluntary statement described in (1) above, will be submitted to the United States attorney for the district in which the registrant refused to be inducted. One copy will be forwarded to the State Director, Selective Service System, of the State in which the registrant refused to be inducted; one copy will be forwarded to the Selective Service local board which delivered the registrant for induction; and the other copy will be retained at the induction station. Such notification will include the following information:
 - (a) Name and address of registrant.
 - (b) Selective Service number of registrant.
 - (c) Number and address of the Selective Service local board which delivered the registrant for induction, and if different, the registrant's own Selective Service local board.
 - (d) A detailed statement of facts concerning the registrant's refusal to be inducted.
 - (e) Names and addresses of witnesses.

- (3) U.S. Army Recruiting District Commanders should contact the United States attorney in their area, in advance, regarding what steps should be taken as to the disposition of any registrant who refuses to be inducted.
- (4) A registrant previously forwarded for preinduction examination who refuses to take any part or all of the preinduction tests and examinations and who is returned for immediate induction and again refuses to take any part or all of the prescribed tests and examinations will be informed that failure to submit to such examination as the commanding officer of the induction station will direct is a violation of Selective Service regulations and punishable as such. If he persists in refusing examination, action will be taken as prescribed in (1), (2), and (3) above, except—
 - (a) A statement, if given, will read:

“I refuse to take the preinduction tests and examinations prescribed for induction into the Armed Forces of the United States.” As in the case of registrants who refuse induction, a registrant who refuses to submit to examination will not be furnished any means of transportation.
 - (b) Where the word “induct” or “induction” appears in connection with notification to be made to the various Selective Service offices and office of the United States attorney, substitute “examined” or “examination,” as appropriate.

Texts of Letter and Memorandum on the Draft

Special to The New York Times

WASHINGTON, Nov. 8—*Following is the text of a letter, dated Oct. 26, to all members of the Selective Service system from the director of Selective Service Lieut. Gen. Lewis B. Hershey, and of a memorandum dated Oct. 24, from General Hershey on draft cards:*

THE LETTER

The basic purpose and the objective of the Selective Service system is the survival of the United States. The principal means used to that end is the military obligation placed by law upon all males of specified age groups. The complexities of the means of assuring survival are recognized by the broad authority for deferment from military service in the national health, safety, or interest.

Important facts, too often forgotten or ignored, are that the military obligation for liable age groups is universal and that deferments are given only when they serve the national interest. It is obvious that any action that violates the military selective service act or the regulations, or the related processes cannot be in the national interest.

It follows that those who violate them should be denied deferment in the national interest. It also follows that illegal activity which interferes with recruiting or causes refusal of duty in the military or naval forces could not by any stretch of the imagination be construed as being in support of the national interest.

The Selective Service system has always recognized that it was created to provide registrants for the armed forces, rather than to secure their punishment for disobedience of the act and regulations. There occasionally will be registrants, however, who will refuse to comply with their legal responsibilities, or who will fail to report as ordered, or refuse to be inducted. For these registrants, prosecution in the courts of the United States must follow with promptness and effectiveness. All members of the Selective Service system must give every possible assistance to every law enforcement agency and especially to United States attorneys.

It is to be hoped that misguided registrants will recognize the long-range significance of accepting their obligations now, rather than hereafter regretting their actions performed under unfortunate influences of misdirected emotions, or possibly honest but wholly illegal advice, or even completely vicious efforts to cripple, if not to destroy, the unity vital to the existence of a nation and the preservation of the liberties of each of our citizens.

Demonstrations, when they become illegal, have produced and will continue to produce much evidence that relates to the basis for classification and, in some instances, even to violation of the act and regulations. Any material of this nature received in national headquarters or any other segment of the system should be sent to state directors for forwarding to appropriate local boards for their consideration.

A local board, upon receipt of this information, may reopen the classification of the registrant, classify him anew, and if evidence of violation of the act and regulations is established, also to declare the registrant to be a delinquent and to process him accordingly. This should

include all registrants with remaining liability up to 35 years of age.

If the United States Attorney should desire to prosecute before the local board has ordered the registrant for induction, full cooperation will be given him and developments in the case should be reported to the state director and by him to national headquarters.

Evidence received from any source indicating efforts by nonregistrants to prevent induction or in any way interfere illegally with the operation of the Military Selective Service Act or with recruiting or its related processes, will be reported in as great detail as facts are available to state headquarters and national headquarters so that they may be made available to United States attorneys.

Registrants presently in classes IV-F or I-Y who have already been reported for delinquency, if they are found still to be delinquent, should again be ordered to report for physical examination to ascertain whether they may be acceptable in the light of current circumstances.

All elements of the Selective Service system are urged to expedite responsive classification and the processing of delinquents to the greatest possible extent consistent with sound procedure.

MEMORANDUM

Subject: Disposition of Abandoned or Mutilated Registration Certificate and Notices of Classification.

1. Whenever an abandoned or mutilated registration certificate or current notice of classification reaches a local board, and the card was originally issued to a registrant by some other board, it should be forwarded to the state

director of selective service, who will forward it to the appropriate local board if within the state, or the appropriate state director if the board of origin is outside the state.

2. Whenever a local board receives an abandoned or mutilated registration certificate or current notice of classification which had been issued to one of its own registrants, the following action is recommended:

(A) Declare the registrant to be delinquent for failure to have the card in his possession.

(B) Reclassify the registrant into a class available for service as a delinquent.

(C) At the expiration of the time for taking an appeal, if no appeal has been taken, and the delinquency has not been removed, order the registrant to report for induction or for civilian work in lieu of induction if in Class I-O, as a delinquent, or in the board's discretion in a flagrant case, report him to the United States attorney for prosecution.

(D) If appeal is taken and the registrant is retained in a class available for service by the appeal board, and the delinquency has not been removed, order the registrant to report for induction or for civilian work in lieu of induction if in Class I-O, as a delinquent, or in the board's discretion in a flagrant case, report him to the United States Attorney for prosecution.

No. 71

Vide No. 65 for Supp.
Brief in support of petition.
(filed March 29, 1969)

Vide No. 65 for Brief of
American Jewish Congress
as amicus curiae. (filed
on July 31, 1969)

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1176

DAVID EARL GUTKNECHT, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 17-22) is not yet reported. The opinion of the district court (Pet. App. 23-31) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 20, 1969. Mr. Justice White extended the time for filing a petition for a writ of certiorari to March 21, 1969, and the petition was filed on March 19, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was properly declared a delinquent and ordered to report for induction as a result of his violation of Selective Service regulations.
2. Whether there was sufficient evidence showing that petitioner willfully failed to submit to induction.

STATEMENT

Having waived a trial by jury, petitioner was convicted in the United States District Court for the District of Minnesota of failing to report for and submit to induction into the Armed Forces of the United States in violation of 50 U.S.C. App. 462. He was sentenced to imprisonment for four years. The court of appeals affirmed the conviction (Pet. App. 17-22).

The evidence (the sufficiency of which is not challenged) is set forth in the Memorandum and Findings of Fact of the district court (Pet. App. 23-31). It showed that petitioner registered with his local board (Sibley County, Minnesota Board, No. 115), and was classified I-A on February 15, 1966. On March 15, 1966, having advised his board of his status as a student, he was reclassified II-S. On November 23, 1966, petitioner filed a claim for exemption as a conscientious objector, and subsequently advised his local board that he was no longer a student. His application for conscientious objector status was denied and petitioner was reclassified I-A on June 21, 1967. He took an appeal to the State Appeal Board on July 20, 1967.

On October 16, 1967, petitioner participated in a "Stop the Draft Week" demonstration at the federal office building in Minneapolis. During that demonstration he attempted to turn his Selective Service registration and classification cards over to a Deputy U.S. Marshal, who refused to accept them. Petitioner then dropped both cards at the Deputy Marshal's feet, together with mimeographed literature explaining that his action was motivated by opposition to the Vietnam conflict.

On November 22, 1967, the Minnesota State Director notified Local Board No. 115 that petitioner's conscientious objector appeal had been denied by the State Appeal Board. On November 27, 1967, petitioner was sent a Notice of Classification advising him of the Appeal Board decision and notifying him again that he was classified I-A.

On December 21, 1967, petitioner was sent a Delinquency Notice (SSS Form No. 304) which stated that he had been declared a delinquent for failing to have his Registration Certificate and Notice of Classification in his possession. On December 26, 1967, he was ordered to report for induction on January 24, 1968. Petitioner reported to the induction center on the prescribed date, but indicated that he had no intention of submitting to processing in any way. He was informed of the pertinent regulations and of the penalties for refusing to be inducted. Petitioner signed a statement to the effect that he refused to participate in the induction process.

At trial petitioner's counsel introduced into evidence a letter and memorandum issued by the Director of the Selective Service System (Pet. App. 43-46) recommending that registrants who participate in illegal activity which interferes with the operation of the system should be reclassified and declared delinquents. No evidence was introduced which showed when petitioner would have been ordered to report for induction had he not been declared a delinquent. The district court found that petitioner was declared a delinquent solely for his non-possession of his registration and classification cards, and that General Hershey's letter and memorandum played no part in the action of the local board in declaring petitioner a delinquent (Pet. App. 29, 30).

ARGUMENT

1. Under Selective Service regulation 32 C.F.R. 1642.4, a local board is empowered to declare as delinquent any registrant who "has failed to perform any duty or duties required of him under the selective service law other than the duty to comply with an Order to Report for Induction (SSS Form No. 252) or the duty to comply with an Order to Report for Civilian Work and Statement of Employer (SSS Form No. 153) * * *." Under another regulation, 32 C.F.R. 1631.7, local boards are required to meet their monthly quotas by ordering registrants to report for induction in the following order: (1) delinquents; (2) volunteers; and (3) unmarried non-volunteers who have attained the age of 19 years and

have not attained the age of 26 years, with the oldest being selected first. Similarly, 50 U.S.C. App. 456 (h)(1), as amended in 1967, gives priority to the induction of delinquent registrants. Petitioner had earlier been classified I-A, and does not challenge that classification here. Thus, the instant situation does not involve a "reclassification" at all. Nonetheless, petitioner claims that since the declaration of delinquency, which placed him in a priority status, accelerated his selection before volunteers and other unmarried non-volunteers who were older, this constituted the imposition of punishment in violation of the First, Fifth, and Sixth Amendments, the Military Selective Service Act of 1967, and the Selective Service regulations (Pet. 7-12).

Preliminarily, we note that there was no showing that petitioner, who was in any event already classified I-A, would not have been called, and would not have been called *when* he was called, irrespective of his delinquent status. Thus, it is not clear that the constitutional and statutory issues which he seeks to raise are necessarily presented on the instant record.¹ However, since the court below apparently assumed that petitioner's "induction date was advanced" as a result of his being declared a delinquent (Pet. App. 20), we turn to the contentions put forward on that premise.

a. On the facts of this case, petitioner, already classified I-A, was properly declared a delinquent and,

¹ A similar contention was recently rejected by this Court in *Boyd v. Clark*, 393 U.S. 316, at least insofar as the availability of pre-induction judicial review of such an acceleration of induction claim is concerned.

as such, was lawfully ordered to report for induction. The district court expressly found that petitioner's delinquency resulted from his failure to have his registration and classification cards in his possession, in violation of Selective Service regulations,² not from his participation in political protest, and that General Hershey's letter and memorandum played no part in that determination by the local board (Pet. App. 29, 30). Petitioner does not dispute the accuracy of those findings. In such narrow circumstances, the delinquency regulations, which have been in effect since the beginning of World War II,³ provide a valid means of carrying out the objectives of the Selective Service Act to provide manpower for the Armed Forces.

Where a registrant fails to perform an explicit duty required of him under the statute or regulations—whether a failure to keep his local board informed of his status or a failure to keep his draft card in his possession—it is beneficial both to the registrant and the Selective Service System for the registrant to be declared a delinquent, rather than to be immediately subjected to criminal prosecution for his violation. It may often be that the registrant's failure to comply with the regulations was either inadvertent or impulsive and that, given the chance to reflect upon his conduct and the consequences thereof, he would choose a different course of action and take steps to purge his delinquency. In effect, the operation of the delin-

² 32 C.F.R. 1617.1, 1623.5; see Pet. App. 19, 29.

³ Selective Service System regulations, Sec. 601.5, 6 Fed. Reg. 6825 (December 31, 1941); Selective Service System regulations, Secs. 642.1, 642.13, 8 Fed. Reg. 14116 (October 19, 1943).

quency regulations postpones the imposition of criminal punishment under the provisions of 50 U.S.C. App. 462, and gives the registrant an opportunity to comply with the duties imposed upon him.⁴

That the delinquency regulations further the objectives of the Act has been expressly recognized by Congress. As noted earlier, delinquency regulations have been in effect for almost thirty years (see note 3, *supra*). During this lengthy period, Congress was presumably aware of these regulations, but did not see fit to rescind or change them. Moreover, when the Selective Service Act was extensively amended in 1967, the congressional committee reports specifically noted the existence of the delinquency regulations (S. Rep. No. 209, 90th Cong., 1st Sess., pp. 3, 6; H. Rep. No. 267, 90th Cong., 1st Sess., p. 17). Indeed, Congress, in enacting the 1967 amendments to the Act, not only failed to modify or weaken the delinquency regulations, but instead inserted a provision in the statute which, for the first time, gave express recognition to their existence.⁵ Thus, these regula-

⁴ The delinquent is given ample opportunity to correct his delinquency under the provisions of 32 C.F.R. 1642.4 at any time, although removal from delinquency status is discretionary with the concerned local board. There is no reason here to speculate that the local board might have refused to remove petitioner's delinquent status. The record indicates that petitioner made no attempt to correct his delinquency, and had no intention of doing so.

⁵ That provision—Section 6(h) of Public Law 90-40, amending 50 U.S.C. App. 456(h)—refers in terms only to the priority induction status of delinquents—a basic feature of the regulations. In using the term "prime age group" in connection with student deferments, the section defines that term to mean "the

tions are an accepted and long-established feature of the Selective Service System, which Congress has implicitly authorized and approved.

b. We recognize that in our brief in *Oestereich v. Selective Service Board No. 11*, 393 U.S. 233 (No. 46, this Term, decided December 16, 1968), we indicated to this Court that in some circumstances the operation of the delinquency regulations might raise serious statutory and constitutional questions. This was suggested in relation to a situation where application of the delinquency regulations had the effect of removing a registrant from an exempt status to which he was otherwise entitled by statute and reclassifying him I-A. Moreover, it was not entirely clear to us that the local board in the *Oestereich* case did not, upon the invitation of General Hershey's letter and memorandum discussed above, trigger the operation of the delinquency regulations because of Oestereich's participation in a political protest against the government's involvement in Vietnam. In that context, it was arguable that the delinquency regulations operated as a penal sanction, under the standards enunciated in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144. Our brief did not mean to suggest, however, that the delinquency regulations could not validly be applied where, as here, a registrant, not statutorily exempt from service in the Armed Forces, simply failed to comply with the duties

age group from which selections for induction into the Armed Forces are first to be made *after delinquents* and volunteers" (emphasis added).

imposed upon him by the regulations, and where no reliance was placed on General Hershey's letter and memorandum and no reclassification was involved. On the present facts, we do not believe that petitioner was unjustifiably subjected to any substantial penal sanction.

c. Petitioner's contention that the delinquency regulations are impermissibly vague or overbroad is without merit. Those regulations authorize acceleration of the induction of a I-A registrant who "has failed to perform any duty or duties required of him under the selective service law * * *" (32 C.F.R. 1642.4 (a)). This language thus simply incorporates the provisions of the Selective Service Act and regulations imposing certain duties on registrants, and petitioner has not shown that any of these provisions is impermissibly vague or overbroad. In particular, the duty involved in this case—the obligation to carry a registration and a classification card at all times (32 C.F.R. 1617.1, 1623.5)—is specific and narrowly defined, and involves no conflict with the freedoms protected by the First Amendment. That issue was settled in *United States v. O'Brien*, 391 U.S. 367, 377–381. The suggestion that the surrendering of his registration and classification cards were acts of "symbolic speech" protected under the First Amendment is likewise answered in *O'Brien, supra*, 391 U.S. at 376–377, 381–382. At all events, petitioner was not prosecuted for that conduct, but rather for his failure to submit to induction.

2. Petitioner contends that the government did not establish that he had failed to submit to induction because there was no showing that he had been given the opportunity to take the traditional "one step forward" at the induction center (Pet. 12-15). Petitioner's argument, however, misconstrues the term "submit to induction." Paragraph 13 of Army Regulation 601-270, involved here, provides in pertinent part:

Definitions. For the purpose of this regulation [dealing with the operation and functions of armed forces induction stations], the following definitions will apply:

* * * *

g. *Induction.* The procedure consisting of the physical inspection (or, if appropriate, the complete medical examination), mental testing (if not already accomplished), the completion of records and necessary processing to complete the transition from civilian to military status, for a period of defined obligation under the provisions of the Universal Military Training and Service Act, as amended.

Here the record shows that petitioner refused to take part in *any* of the processes leading up to the ceremonial "one step forward." It is hardly appropriate to require induction center personnel to ask a recalcitrant registrant to take the step forward where the registrant has refused to participate in the processes which would preliminarily test his physical and other qualifications for service in the Armed Forces. Petitioner's conviction for failing to submit to induction was therefore proper. Cf. *Williams v. United States*,

203 F. 2d 85, 87 (C.A. 9), certiorari denied, 345 U.S. 1003. Nor does petitioner's conviction present a conflict with *Chernehoff v. United States*, 219 F. 2d 721 (C.A. 9), since in that case the court indicated that it would have reached a different result—as it had done in an earlier case (*Bradley v. United States*, 218 F. 2d 657 (C.A. 9))—had the registrant been warned of the consequences of his refusal to submit to all of the induction processes. Here the record shows that petitioner was so warned, and refused to take part in those processes.*

CONCLUSION

For the reasons stated above, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1969.

* Petitioner's suggestion that the indictment was defective as "duplicious" was amply refuted by the court below (see Pet. App. 18-19). Petitioner was charged with failure to "submit to" as well as to "report for" induction (see Pet. 6), and the record plainly shows that he refused to submit to induction (see Pet. App. 24-27).

IN THE
Supreme Court of the United States

October Term 1969
No. 71

Office-Supreme Court, U.S.
FILED

JUL 28 1969

JOHN F. DAVIS, CLERK

DAVID EARL GUTKNECHT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit.

BRIEF FOR PETITIONER.

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I.

<p>The Delinquency Regulations, 32 C.F.R. §§ 1642.1 et seq., Are Not Authorized by the Military Selective Service Act of 1967; Even If Authorized by the Act, the Delegation Is Void as Standardless and Unduly Vague; Alternatively, the Regulations Are Invalid as Lacking Any Standard to Guide the Local Boards' Judgment, as Violative of Procedural Due Process of Law, and as Permitting Punishment of Registrants, as in This Case, for Exercising First Amendment Rights. Moreover, the Use of the Delinquency Power Under the Circumstances Present in This Case Is Not Authorized by the Regulations</p>	11
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IN THE
Supreme Court of the United States

October Term 1969
No. 71

DAVID EARL GUTKNECHT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF FOR PETITIONER.

Opinions Below.

The decision of the court of appeals is reported at 406 F. 2d 494 (8th Cir. 1969). The findings and conclusions of the district court are reported at 283 F. Supp. 945 (D. Minn. 1968).

Jurisdiction.

The judgment of the court of appeals was entered January 20, 1969. On February 11, 1969, Mr. Justice White entered an order extending the time for filing the petition for certiorari to and including March 21, 1969. The petition for certiorari was filed March 19, 1969, and certiorari granted April 28, 1969. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Statutes and Regulations Involved.

The statutes and regulations involved, set forth in full in Appendix A, *infra*, are: U.S. Const., amendment 1 (free speech clause), U.S. Const., amendment 5 (due process clause), U.S. Const., amendment 6, Military Selective Service Act of 1967, §§ 5(a), 6(h)(1), 12(a), 12(b)(6), 50 U.S.C. App. §§ 455(a), 456(h)(1), 462(a), 462(b)(6), 32 C.F.R. §§ 1602.4, 1642.1-46. In addition to the foregoing, a directive of the Director of Selective Service is reprinted as Appendix B, *infra*.

Questions Presented.

1. Whether the Selective Service delinquency provisions, providing for discretionary stripping of their deferments or exemptions and priority induction of those whom the local draft board believes have failed to perform any "duty" under the selective service law and regulations, are invalid on their face and as applied to one who in peaceable opposition to the war in Vietnam turned in his selective service registration certificate and notice of classification, in that:

- a. they constitute a system of sanctions exercised without a Congressional delegation of the power to sanction;
- b. if authorized by Congress, the delegation is void for vagueness in that it is "so unguided as to be unguiding;"
- c. the delinquency regulations are void for vagueness;
- d. the delinquency regulations deny procedural due process of law;

e. the delinquency regulations, as interpreted and authorized to be applied in a directive from the Director of Selective Service, visit upon local boards a roving commission to punish registrants for the peaceable exercise of first amendment rights;

f. the delinquency regulations were improperly applied in this case, in that Congress has not authorized their use to order a registrant for priority induction in violation of his statutory right and in that the petitioner did not fail to perform a "duty" within the meaning of the regulations.

2. Whether the evidence sustains the charge in the indictment that petitioner failed "to report for and submit to induction," when he concededly reported and was never given the opportunity to submit, or whether, on the other hand, there was a fatal variance between the indictment and the government's proof.

3. Whether the indictment, charging in one count both a failure to report for and a failure to submit to induction, is duplicitous and fails to state an offense against the United States.

Statement of the Case.

Petitioner, a 20-year-old young man who faces a term of four years imprisonment, registered with Selective Service Local Board No. 115, Gaylord, Minnesota, on December 20, 1965, a few days after his eighteenth birthday. He was classified I-A on February 15, 1966, and reclassified II-S (student) on March 15, 1966. On June 21, 1967 petitioner was again classified I-A after he had notified his Local Board, by letter dated May 15, 1967, that he was no longer a student.

On November 23, 1966, petitioner had filed an application with his Local Board for exemption as a conscientious objector under Section 6(j) of the Universal Military Service and Training Act (subsequently renamed the Military Selective Service Act of 1967). The application for conscientious objector status was denied by the Local Board on June 21, 1967, and petitioner duly noted his appeal to the State appeal board on July 20, 1967.

On October 16, 1967, as part of a nation-wide protest against the war in Vietnam, petitioner surrendered his Registration Certificate (SSS Form 2) and Notice of Classification (SSS Form 110) by leaving them on the steps of the Federal Building in Minneapolis with a statement explaining the basis of his protest (Appendix, pp. 42-43)¹ On the same date petitioner's Registration Certificate and Notice of Classification were sent to the Minnesota State Director of Selective Service, and on the following day were sent to the Minneapolis office of the Federal Bureau of Investigation at its request (Appendix, pp. 40-43).

On October 24, 1967, Local Board Memorandum No. 85 was issued by the Selective Service System (Appendix B, *infra*) and on October 26, 1967 General Lewis B. Hershey, Director of the Selective Service System issued a special letter (Appendix B, *infra*) which encouraged the reclassification of registrants who surrendered their Selective Service documents or who engaged in a variety of other actions thought by General Hershey to be disruptive of the Selective Service System or not in the national interest.

¹Citations to "Appendix" refer to the Appendix required by this Court's Rule 36. "Appendix A" and "Appendix B" refer to appendices to this brief.

On November 22, 1967, the Minnesota State Director's office notified Local Board No. 115 that petitioner's conscientious objector appeal was denied. On November 27, 1967, petitioner was sent a Notice of Classification advising him of the Appeal Board decision and notifying him again that he was I-A.

On December 21, 1967, petitioner was declared delinquent by the local board. Appendix, p. 44.

Five days later, on December 26, 1967, petitioner was sent an order to report for induction (SSS Form 252) on January 24, 1968.

On January 24, 1968, petitioner appeared at Local Board No. 115 pursuant to the order to report for induction [T. 15] where "he joined the rest of the group -- and got on the bus and left for the Federal Building in Minneapolis" (Appendix, p. 10).

At the induction center in Minneapolis, petitioner "indicated to the military personnel there that "he had no intentions to process in any way, such as physical examination or mental" (*Id.* at 12). He was then informed "of the regulations pertaining to refusal to process for induction" (*Id.* at 13) and informed of the penalties for "refusing to be inducted into the service . . ." (*Id.* at 13, 21). Petitioner was not given the opportunity to take the one step forward, is prescribed by Army Regulation 601-270(37)(1) nor was the statement of imminent induction, also required by Army Regulation 601-270(37)(1), ever read to him (*Id.* at 19, 22-23). Petitioner signed a statement that said "I refuse to take part in any or all of the prescribed processing" (*Id.* at 15).

In March 1968, petitioner was indicted in the following terms:

"That on or about the 24th day of January, 1968, at the City of Minneapolis, County of Hennepin, in the State and District of Minnesota, DAVID EARL GUTKNECHT willfully and knowingly did fail and neglect to perform a duty required of him under and in the execution of the Universal Military Training and Service Act and the rules, regulations and directions duly made pursuant thereto in that he did fail and neglect to comply with an order of his local board to report for and submit to induction into the armed forces of the United States, in violation of Title 50 App., United States Code, Section 462." *Id.* at 2.

He was tried without a jury, found guilty, and sentenced to four years' imprisonment. The conviction was affirmed by the court of appeals on January 20, 1969. The court held that petitioner's surrender of his draft cards was not protected by the First Amendment, following *O'Brien v. United States*, 391 U.S. 367 (1968), that his accelerated induction as a delinquent was not "lawless or irregular," and that the facts alleged in the indictment had been proved.

Summary of Argument.

The argument below is divided into three major subdivisions, corresponding to the points upon which certiorari was granted.

The Invalidity of the Delinquency Regulations.

In a multi-faceted attack upon the delinquency power which the Selective Service System has arrogated to it-

self, the argument below contends that the delinquency regulations are invalid on their face and as applied to petitioner in this case.

First, petitioner contends that there is no statutory authorization for the local boards entirely discretionary power to strip registrants of their deferments or exemptions and order them for induction out of the normal order of call established by § 5(a) of the Military Selective Service Act of 1967 and 32 C.F.R. § 1631.7 (a). Noting that no other administrative agency claims the power to impose sanctions or penalties without an express statutory warrant, it is argued that the System frustrates the carefully-designed system of deferments, exemptions and priorities for induction established under Congressional supervision. This argument gains force from an historical summary of the delinquency regulations, which have developed since 1940 from a simple, standardized method of reporting suspected law violators to the United States Attorney for possible prosecution to a system of sanctions superimposed upon and independent of the criminal process.

Next, petitioner contends that even if the Congress can be said to have authorized or ratified the delinquency regulations, the delegation is so broad, vague and standardless as to be invalid. None of the factors which this Court relied upon in the World War II delegation cases (custom and usage; requirements that the administrator give reasons for his acts) are present in the delinquency regulations.

Petitioner also argues that the delinquency regulations are vague and overboard so as to provide no ascertainable standard of conduct for registrants and no criterion for decision by local boards, which are left

free to declare a registrant delinquent or not, and to remove him from that status or not, in their absolute and unguided discretion. This argument rests upon cases invalidating systems of regulation impinging upon speech (which it is claimed is the purpose and effect of the delinquency regulations as applied), and upon the line of nonspeech cases insisting upon precision in statutes or regulations which make up a system of penalties or sanctions.

Petitioner also claims the delinquency regulations to be invalid as violative of procedural due process. If the regulations authorize imposition of punishment, they are invalid for failure to provide the safeguards which the fifth and sixth amendments require accompany a criminal trial. If the Court should view the regulations as not imposing punishment, but merely as authorizing denial or deprivation of a statutory or regulatory governmental benefit, they are nonetheless invalid for failure to provide for notice, hearing, confrontation, cross-examination, counsel and the other procedural protections which this Court has insisted upon even in purely "administrative" proceedings.

Petitioner also claims that the application of the regulations to him violated the first amendment. Noting that the Director of Selective Service has issued a memorandum and letter directing local boards to use the delinquency regulations in ways which clearly trespass upon the freedoms of speech and assembly, petitioner argues that the failure of his local board affirmatively

to disavow this directive in reclassifying him invalidates its action. The Court simply cannot tell whether the board relied upon a permissible or impermissible standard in reclassifying petitioner. However, even if the Court should conclude that the sole ground for the reclassification was petitioner's failure to possess his registration certificate and notice of classification, it is argued that this conduct was protected by the first amendment.

Petitioner also contends that the delinquency regulations cannot validly be applied to deprive him of his statutory right to be called for induction only when all those under 26, but older than he, have been called. Finally, he argues that the regulations were improperly applied to him because even if failure to possess one's registration certificate or notice of classification is a crime under § 12(b)(6) of the Military Selective Service Act of 1967, it is not a failure to perform a "duty" under the delinquency regulations.

Variance Between Indictment and Proof.

Petitioner was indicted for failure to report for and submit to induction. The government conceded at trial that he did report for induction, but rested its case upon his alleged expression of unwillingness to complete preinduction processing. Petitioner argues that a conviction for refusal to submit to induction can only be had upon proof that a registrant was offered the opportunity to submit to induction in the manner prescribed in the relevant Army regulations. It is uncon-

tested that petitioner was never given this opportunity. If the evidence discloses the commission of any offense, it is an offense for which petitioner was not indicted: failure to obey the orders of the induction station personnel.

The Indictment Fails to State an Offense.

Petitioner argues that an indictment for failure to report for and submit to induction, in a single count, is duplicitous. Failure to report and failure to submit are entirely separate offenses having quite different elements and involving vastly different legal and factual demonstrations by government and defense. Therefore, an indictment which charges both in a single count not only charges two offenses, but fails to apprise the defendant of the nature and cause of the accusation against him.

ARGUMENT.

I.

THE DELINQUENCY REGULATIONS, 32 C.F.R. §§ 1642.1 ET SEQ., ARE NOT AUTHORIZED BY THE MILITARY SELECTIVE SERVICE ACT OF 1967; EVEN IF AUTHORIZED BY THE ACT, THE DELEGATION IS VOID AS STANDARDLESS AND UNDULY VAGUE; ALTERNATIVELY, THE REGULATIONS ARE INVALID AS LACKING ANY STANDARD TO GUIDE THE LOCAL BOARDS' JUDGMENT, AS VIOLATIVE OF PROCEDURAL DUE PROCESS OF LAW, AND AS PERMITTING PUNISHMENT OF REGISTRANTS, AS IN THIS CASE, FOR EXERCISING FIRST AMENDMENT RIGHTS. MOREOVER, THE USE OF THE DELINQUENCY POWER UNDER THE CIRCUMSTANCES PRESENT IN THIS CASE IS NOT AUTHORIZED BY THE REGULATIONS.

The argument below begins with a summary of the present delinquency regulations (32 C.F.R. §§ 1642.1-.46 (1969)), and an analysis of the development of the regulations from their initial, narrow function of record-keeping as to delinquents, through their World War II use as a relatively precise and certain guide to the invocation of the power to deprive a registrant of a deferment or exemption or of a preferred place in the order of call for induction, to their present wholly standardless provisions reposing absolute discretion in the local board as to declaration and remission of delinquency status. The argument which follows this introductory discussion treats the points upon which certiorari was granted in the order set forth in the headnote to this section of petitioner's brief.

A. The Delinquency Regulations Today and Their History.

1. Today's Delinquency Provisions.

The delinquency regulations provide for two "types" of delinquency, which may be designated "declared" and "undeclared." "Undeclared" delinquency is not relevant to this case: a registrant who fails to report for or submit to induction, or who fails to report for civilian alternative service,¹ is termed a "delinquent" by the regulations, and is automatically reported by the local board to the United States Attorney, the board's only discretion being to hold up the report for thirty days in an attempt to locate the delinquent and secure his compliance with the order to report for induction or the order to report for civilian work. The regulations imposing this duty upon the local boards constitute a standardized, carefully drawn system for reporting those who have presumptively violated the law by disobeying orders of their local boards and for invoking the system of criminal justice with all of its protections for the rights of an accused.

Usually, however, when the "delinquency" power is spoken of without qualification, "declared delinquency" is what the speaker has in mind. 32 C.F.R. § 1642.4(a) (1969) provides:

"(a) Whenever a registrant has failed to perform any duty or duties required of him under the selective service law other than the duty to comply with an Order to Report for Induction (SSS Form No. 252) or the duty to comply with an Order to Report for Civilian Work and Statement of Employer (SSS Form No. 153), the local board may declare him to be a delinquent."

¹After being classified I-O (conscientious objector opposed to war in any form and to participation in the military, even in noncombatant service).

It will be noted that the board "may", but need not, declare the registrant a delinquent. The balance of § 1642.4 sets out the procedure by which the declaration of delinquency and removal from this status is accomplished:

"(b) When the local board declares a registrant to be a delinquent, it shall enter a record of such action and the date thereof on the registrant's Classification Questionnaire (SSS Form No. 100) and shall complete a Delinquency Notice (SSS Form No. 304), in duplicate, setting forth the duty or duties which the registrant has failed to perform. The local board shall mail the original to the registrant at his last known address and file the copy in his Cover Sheet (SSS Form No. 101).²

(c) A registrant who has been declared to be a delinquent may be removed from that status by the local board at any time. When the local board removes a registrant from delinquency status, it shall enter a record of such action and the date thereof on the registrant's Classification Questionnaire (SSS Form No. 100) and shall advise the registrant of such removal by letter a copy of which shall be filed in his Cover Sheet (SSS Form No. 101)."

Again, note that removal from delinquency status, while it may be done at "any time," is entirely within the discretion of the local board under the regulations.

The declaration of delinquency carries the following consequences: If a registrant has a deferment or exemption under the Military Selective Service Act of

²The "Cover Sheet" is the registrant's permanent selective service file. See Sel. Serv. L. Rep., Practice Manual ¶¶ 1072-76.

1967 and the Selective Service regulations (32 C.F.R. Parts 1600 through 1690), he "may" be reclassified I-A, I-A-O or I-O,³ as may be appropriate given the information in his file 32 C.F.R. § 1642.12 (1969). The use of the word "may" indicates that the board need not strip a registrant of his deferment or exemption, but has discretion limited only by judicial decision, *e.g.*, *Oestereich v. Selective Service Board*, 393 U.S. 233 (1968), and the National Headquarters of the Selective Service System.⁴

A registrant whose deferment or exemption is taken away under the delinquency power has the same right of personal appearance and appeal that is given to every other reclassified registrant, with no different or additional procedural rights. He may, upon timely request, appear before his local board.⁵ If he cannot or does not make a personal appearance,⁶ or if he appears and the board retains him in a class available for service (I-A, I-A-O, or I-O), he may, again upon timely

³Registrants in these three classifications are referred to as "available for service." A I-A registrant is available for induction as a combatant, a I-A-O registrant is available for induction for noncombatant service (any service not involving the handling of weapons), and a I-O registrant may be ordered to perform civilian work in lieu of induction. See Military Selective Service Act of 1967, § 6(j), 50 U.S.C. App. § 456(j).

⁴See Supplemental Brief in Support of Petitions for Certiorari, *Breen v. Selective Service Local Board No. 12*, *Kolden v. Selective Service Local Board No. 4*, and *Gutknecht v. United States*, Nos. 1114, 1175 and 1176, O.T. 1968, pp. 5-8.

⁵See 32 C.F.R. Part 1624, defining the rights of a registrant upon his personal appearance. See also Sel. Serv. L. Rep., *Practice Manual* ¶¶ 1079-85.

⁶The regulations do not provide for transfer of the personal appearance. Thus, if a registrant has moved far away from the local board at which he initially registered, he may well be unable to meet the expense of a journey to the board for the purpose of discussing his case.

request, appeal to the appeal board for the federal judicial district in which his local board is located.⁷ During the pendency of his personal appearance and appeal, he may not be ordered to report for induction or for civilian work. 32 C.F.R. §§ 1624.3, 1626.41 (1969).

A registrant who is declared delinquent and who, like petitioner Gutknecht, is not deferred or exempt has no appeal rights whatever. He is not entitled to an appearance before his local board, nor to an appeal to the appeal board. He is simply I-A (or I-A-O or I-O) delinquent unless and until the local board removes him from that status.

When a delinquent registrant classified in or reclassified to Class I-A (or I-A-O or I-O) has exhausted whatever appeal rights he may have, his local board "shall" order him to report for induction (or for civilian work if he is I-O), ahead even of volunteers for induction. 32 C.F.R. § 1642.13. This "priority induction" provision deprives a registrant of benefits to which he is entitled under 32 C.F.R. § 1631.7 (1969), which sets out the order in which registrants who

⁷Failure to request a personal appearance does not waive the registrant's right to take an appeal to the appeal board. He may appeal in writing (by letter to his local board) within thirty days after the board mails him its initial notice that it has reclassified him, or (if he exercises his right to a personal appearance) within thirty days after the board sends him the notice of classification reflecting its decision after the personal appearance. If he resides in a federal judicial district other than that in which his local board is located, he may transfer the appeal to the appeal board having jurisdiction over his place of residence. If he is employed in a federal judicial district other than that in which his local board is located, and his case involves a claim to an occupational deferment (Class II-A), he may appeal to the appeal board for the federal judicial district in which he is employed. The regulations governing appeals are set out in 32 C.F.R. Part 1626. See also Sel. Serv. L. Rep., Practice Manual ¶¶ 1085-94.

are I-A or I-A-O are to be called for induction, and 32 C.F.R. Part 1660, which provides that a I-O registrant may not be called for civilian work any sooner than he would have been ordered to report for induction if he were I-A or I-A-O. § 1631.7 provides for two methods of computing the "order of call" for induction, only one of which has ever been used and is in issue here.⁸

Briefly, § 1631.17(a) provides for six categories of inductees. The board must select men for induction from among those registrants who are I-A or I-A-O, physically examined and found qualified, by category and within each category in the manner set out in the regulations.^{8a} The number of men selected by each

⁸The other "order of call" provision, § 1631.7(b), was enacted after the Military Selective Service Act of 1967 gave the President authority to institute calls for induction by "age groups" rather than under the § 1631.7(a) "oldest first" system. This power has never been used by the President.

^{8a}The six categories, as set out in § 1631.7(a), are:

"(1) Delinquents who have attained the age of 19 years in the order of their dates of birth with the oldest being selected first.

"(2) Volunteers who have not attained the age of 26 years in the sequence in which they have volunteered for induction.

"(3) Nonvolunteers who have attained the age of 19 years and have not attained the age of 26 years and who (A) do not have a wife with whom they maintain a bona fide family relationship in their homes, in the order of their dates of birth with the oldest being selected first, or (B) have a wife whom they married after the effective date of this amended subparagraph and with whom they maintain a bona fide family relationship in their homes, in the order of their dates of birth with the oldest selected first.

"(4) Nonvolunteers who have attained the age of 19 years and have not attained the age of 26 years and who have a wife whom they married on or before the effective date of this amended subparagraph and with whom they maintain a bona fide family relationship in their homes,

board from among its own registrants is determined by the monthly "call" for induction. After the Secretary of Defense determines how many men must be conscripted in a given month, this figure is given to the Director of Selective Service. The Director establishes a "call" for induction which is somewhat larger than the number of inductees needed, due to the probability that some potential inductees will be disqualified during final processing or will refuse to submit to induction. The Director divides this call among the states. Each State Director of Selective Service apportions his state call among the local boards in his state, with each local board receiving a call in proportion to the number of its registrants who are in a class available for service and who have been examined and found qualified.⁹ 32 C.F.R. § 1631.1 (1969).

This, briefly, is the present system. Its predecessors are worthy of attention for the light they shed upon its scope and meaning.

2. Precursors of Delinquency: The 1917 Act.

Under the Selective Draft Act of 1917, 40 Stat. 76 (1917), a registrant was in the military from the date

in the order of their dates of birth with the oldest being selected first.

"(5) Nonvolunteers who have attained the age of 26 years in the order of their dates of birth with the youngest being selected first.

"(6) Nonvolunteers who have attained the age of 18 years and 6 months and who have not attained the age of 19 years in the order of their dates of birth with the oldest being selected first.

In selecting registrants in the order of their dates of birth, if two or more registrants have the same date of birth they shall, as among themselves, be selected in alphabetical order."

⁹There is a great disproportion among local boards as to the number of persons registered. Nat'l Advisory Comm'n on Selective Service, *In Pursuit of Equity: Who Serves When Not All Serve?* (1967).

specified in his notice from the local board. Section 2 provided:

"All persons drafted into the service of the United States . . . shall, from the date of said draft . . ., be subject to the laws and regulations governing the Regular Army."

Every male between the ages of 21 and 30 was required to fill out a registration form. If a subject male failed to do so, his name was forwarded to the Army, which sent him a notice "drafting" him. See *United States ex rel. Bergdoll v. Drum*, 107 F. 2d 897 (2d Cir. 1939). He would also be subject to prosecution for a misdemeanor for failure to register. Selective Draft Law § 5, 40 Stat. 80.

One who was ordered to report and did not do so was rounded up by the Army and courtmartialed as a deserter. See *United States ex rel. Bergdoll v. Drum, supra*; *Billings v. Truesdell*, 321 U.S. 542, 545-46 (1944). Other infractions against regulations under the Selective Draft Law were dealt with in similarly summary fashion.¹⁰ Roundups of "slackers" occurred regularly, and there is little formal record of the disposition of most cases arising in such mass arrests; one may legitimately suspect that the arrested persons either produced some evidence of registration or deferment, or found themselves in the military,¹¹ much as would

¹⁰Not under discussion here are the penal provisions of the 1917 Act which permitted the Secretary of War to regulate the dispensing of liquor and prevent the keeping of bawdy houses near military reservations. §§ 12, 13, 40 Stat. 82-83. These regulations, upheld in *McKinley v. United States*, 249 U.S. 397 (1919), know no parallel in the present Military Selective Service Act of 1967.

¹¹The pressure to turn the prosecution of antiwar activities, including speech, over to military authorities was great. See 1 (This footnote is continued on the next page)

happen to any person who had been required to register but had not done so. In summary, it may fairly be said that enforcement of the Selective Draft Law with respect to those subject to service was left principally to the military, with local boards and civilian prosecutorial officials playing a reporting and policing role. Only with regard to conspiracies to obstruct the draft—speechmaking about the war, pamphleteering, and other activities by those not subject to conscription, and violations of “police regulations” such as those regarding liquor and prostitution near military reservations, see note 10 *supra*, was civilian authority routinely invoked and criminal prosecutions commenced in the federal district courts. See *Schneck v. United States*, 249 U.S. 47 (1919); *Ruthenberg v. United States*, 245 U.S. 480 (1918).

3. The World War II Experience.

The Selective Training and Service Act of 1940, 54 Stat. 885 (1940), 50 U.S.C. App. § 301 (repealed), marked a significant departure from the 1917 Act, as far as enforcement was concerned. This change, chronicled and interpreted in *Billings v. Truesdell*, 321 U.S. 542 (1944), consisted principally in committing to the civil courts the responsibility for enforcing compliance with the conscription law and for punishing refusals to report for or submit to induction. Section 11 of the 1940 Act (almost identical to § 12(a) of the Military Selective Service Act of 1967, 50 U.S.C. App. § 462-(a)) “withheld from military courts martial jurisdiction of cases arising under the Act unless the person in-

Emerson & Haber, Political and Civil Rights in the United States 284-90 (2d ed. 1958). Cf. Dranitzke, *Possession of Registration Certificates and Notices of Classification by Selective Service Registrants*, 1 Sel. Serv. L. Rep. 4029 (1968).

volved had been 'actually inducted' or 'unless he is subject to trial by court martial under laws in force prior to the enactment of this Act.'" *Billings v. Truesdell*, 321 U.S. at 546. Section 3 of the 1940 Act provided, as does section 4(a) of the Military Selective Act of 1967, 50 U.S.C. App. § 454(a), that no person should be inducted until his physical and mental fitness had been determined under applicable standards.

Nowhere in the 1940 Act was any mention made of "delinquency" or "delinquents". The regulations issued under the Act, codified to 32 C.F.R., chapter VI (1940 Supp.), introduced the term "delinquent" to the Selective Service law.¹² 32 C.F.R. § 601.106 (1940 Supp.) defined a delinquent as:

"(a) any man, required under the selective service law and directions given pursuant thereto to present himself for registration on a certain day fixed by the President, who fails to so present himself and submit to registration on that day and has no valid reason for having failed to perform that duty; or (b) any registrant who prior to his induction into the military service fails to perform at the required time, or within the allowed period of given time, any duty imposed upon him by the selective service law, and directions given pursuant thereto, and has no valid reason for having failed to perform that duty."

32 C.F.R. §§ 603.389 through 603.392 prescribed the procedure to be followed by the local board when it had "reason to believe" that a nonregistrant under its juris-

¹²The regulations were issued at different times. The delinquency provisions with which we are here concerned were part of Exec. Order 3545, Sept. 23, 1940, 5 F.R. 3779, and Exec. Order 8560, Oct 4, 1940, 5 F.R. 3923. In this brief, citations to appropriate C.F.R. codifications will be used rather than the Federal Register citations.

diction or one its registrants was a delinquent. These regulations provided that the local board should prepare a notice of delinquency and mail one copy to the suspected delinquent, mail one copy to the Governor and file one copy. 32 C.F.R. §603.389 (1940 Supp.). The notice required the delinquent to report to the local board. 32 C.F.R. § 603.390 (1940 Supp.). The board was to investigate the suspected delinquency to determine if the delinquent was, in its view, "innocent of any wrongful intent." If it found him innocent, the board proceeded to process him just as any other registrant. *Id.* If it found his intent other than innocent, or if the suspected delinquent failed to report to the local board within five days after the notice of delinquency was mailed, the board turned the case over to the United States Attorney. § 603.391. Thus, the board's determination of "intent" was an administrative decision whether or not to invoke the criminal process, with all its safeguards of indictment by a grand jury, appraisal, counsel, confrontation, jury trial, compulsory process, and privilege against self-incrimination. This determination is cognate to that provided in 47 U.S.C. § 503-04: These sections authorize a civil suit for forfeitures of up to \$10,000 for violations of a licensee's responsibilities under the Communications Act. As a condition precedent to such a suit, the FCC must make a determination of "apparent liability," which Professor Jaffe terms "a semi-formal though legally inconclusive adjudication." Jaffe, *Judicial Control of Administrative Action* 113 (1965). The same description would aptly apply to the delinquency regulations as originally issued.

On December 30, 1941, after Pearl Harbor, the selective service regulations were amended, effective Feb-

ruary 1, 1942. The delinquency provisions, though recodified to 32 C.F.R. Part 642, remained essentially unchanged. The local board was directed to make up notices of delinquency in quadruplicate instead of triplicate, and post the additional copy. 32 C.F.R. § 642.1 (a) (1938-43 Supp.). The cooperation of press, radio and police was to be sought in locating suspected delinquents. 32 C.F.R. §§642.1(b), 642.2(d) (1938-43 Supp.). If the board determined that a registrant was not innocent of wrongful intent or if it was unable to locate him, it was, as under the former regulations, to report him to the United States attorney. However, 32 C.F.R. § 642.5 (1938-43 Supp.) provided that after referral of a case to the United States Attorney, if a delinquent offered to bring himself into compliance with the law, the board was to inform the United States Attorney of the offer and, if the United States Attorney requested, to "offer a suggestion as to the advisability of discontinuing the prosecution of a delinquent who has complied or is complying with the law." 32 C.F.R. § 642.5 (1938-43 Supp.). The board was given a guideline for use in making its judgments: "If it is determined that the delinquency is not wilful, or that substantial justice will result, the local board should encourage the delinquent to comply with his obligations under the law and, if he does so or offers to do so, should urge that any charge of delinquency against him or any prosecution of him for delinquency be dropped." *Id.*¹³

¹³Of course the statute did not permit a prosecution for "delinquency," but only for violation of its express terms or of duties imposed by valid regulations or directions of the local board. The question whether a given regulation imposes a "duty" the violation of which may be the subject of criminal punishment is taken up in Part I, F, *infra*.

Again, the regulations provided a means by which the board and the United States Attorney would work together in finding suspected delinquents and either obtaining compliance with the law or initiating a criminal prosecution; the board was not given the task of punishing or disciplining law violators, but only of advising the United States Attorney in the exercise of his prosecutorial discretion.

In 1943, however, the regulations were radically altered. The definition of delinquent was changed somewhat,¹⁴ and Part 642 of 32 C.F.R. was completely rewritten. A delinquent nonregistrant was to be brought before the board, registered and classified in a class available for service.¹⁵ 32 C.F.R. §§ 642.11-.2 (1943 Supp.). In addition, the regulations required that the board reclassify in a class available for service any registrant who failed to perform a duty required under the Act and regulations and induct him as soon as possible without regard to the order of call established elsewhere in the regulations. 32 C.F.R. § 642.13(a).¹⁶

The board was directed to accord a registrant whose deferment or exemption had been taken away the procedural rights of personal appearance and appeal to which he would otherwise have been entitled. 32 C.F.R. § 642.14(a) (1943 Supp.). The regulations also provid-

¹⁴32 C.F.R. § 601.5 (1943 Supp.), as amended by 8 F.R. 14115: "a delinquent is any man liable for training and service . . . who fails or neglects to perform any duty required of him under the provisions of the Selective Training and Service Act of 1940, . . . or rules and regulations made pursuant thereto."

¹⁵The classes available for service were I-A, I-A-O and IV-E. IV-E corresponds to the present day I-O classification. See 32 C.F.R. § 622.51 (1938-43 Supp.).

¹⁶Delinquents over 45 were merely to be reclassified as over the age of liability. 32 C.F.R. § 642.12(b).

ed that in the case of a registrant who was not reclassified as a result of his delinquency and who therefore was not entitled to a personal appearance and appeal, the local board could "reopen" the classification and accord the rights of personal appearance and appeal "at any time before induction." 32 C.F.R. § 642.16(b) (1943 Supp.). However, the regulation provided "That the local board, regardless of other circumstances, shall decline to reopen the classification of such registrant if it determines that he knowingly became a delinquent." *Id.*

In the case of a registrant who had an appeal of right under § 642.14(a), or who was given appeal rights under § 642.14(b), the appeal board was directed to examine the file and determine whether or not "the registrant knowingly became a delinquent." If so, he was to be retained in a class available for service; if not, he was to be "classified on appeal in the usual manner" and the fact that he was a delinquent was to be "disregarded." 32 C.F.R. § 642.14(c) (1943 Supp.). Other provisions of the regulations provided for cooperation between the local board and the Justice Department or local United States Attorney, and for the keeping of necessary records. 32 C.F.R. §§ 642.41-46 (1943 Supp.).

In sum, the 1943 amendment gave the board the power to send a man into the military for a violation of the law or regulations. This Court may take notice of the difficult and dangerous times which no doubt led to the Selective Service System legislating itself such power. At least, however, the 1943 regulations provided an ascertainable standard for the board's action—the registrant who "knowingly" became delinquent was treated differently from he who became delinquent

through oversight or neglect or good faith ignorance of the law's requirements, although the fact-finding mechanism by which such determinations were made left something to be desired.

The delinquency regulations were not again amended during the effective period of the 1940 Act, except for minor changes in 1944 and 1946. 32 C.F.R. § 642.12 (1944 Supp.); 32 C.F.R. §§ 642.12-.13 (1946 Supp.).¹⁷

4. Delinquency Regulations Since 1948.

In 1947-48, the Office of Selective Service Records maintained draft records under the Act of Mar. 31, 1947, 61 Stat. 31, codified to 50 U.S.C. App. §§ 321-29 (repealed). The Selective Service Act of 1948, 62 Stat. 204, reinstituted conscription in substantially its present form. The regulations issued under the 1948 Act, 32 C.F.R. Part 1642, are almost identical to the present delinquency regulations.

The 1948 Act, like its predecessors, did not contain any reference to delinquency or delinquents. Not until 1967, in § 6(h)(1) of the Act, did Congress mention "delinquents."

Thus, the history of the delinquency provisions shows an evolution by administrative regulatory fiat away from a simple reporting system, through a standardized coercive mechanism giving a local board quite limited discretion, to today's utterly standardless system subject only to occasional administrative or judicial correction. Petitioner turns to an analysis of this system of rules.

¹⁷The 1946 change apparently required the local board to withhold induction or order to civilian work of a delinquent upon written request of the United States Attorney. Earlier regulations had only required that the United States Attorney be kept informed of the declarations of delinquency by the board and that his advice be asked. 32 C.F.R. § 642.42 (1943 Supp.).

B. The Delinquency Regulations, 32 C.F.R. Part 1642, Are Not Authorized by the Military Selective Service Act of 1967 and Are, Therefore, Void.

The delinquency power is extraordinary. No federal agency claims to have comparable authority to that which Part 1642 commits to local boards—the power to order a man to two years of military service for an infraction of regulations without providing procedural safeguards. The Selective Service System is not bashful in characterizing the delinquency power:

“Selective Service Regulations are designed to delay the prosecution of a violator of the law until after he has failed to report for or refused to submit to induction or assigned civilian work. This is to prevent, wherever possible, prosecutions for minor infractions of rules during his selective service processing, thereby reducing the number of cases that reach the courts and also giving the registrant, before being prosecuted, an opportunity to report for service in the armed forces. Since the purpose of the law is to provide men for the military establishment rather than for the penitentiaries, it would seem that when a registrant is willing to be inducted, he should not be prosecuted for minor offenses committed during his processing. The result of this procedure is that the great majority of prosecutions involve the failure to report for or refusal to submit to induction or assigned civilian work.”

* * *

“The escalation of the United States military involvement in Vietnam increased the draft calls, and

there was an upsurge of public demonstrations in protest. Some of these protests took the form of turning 'draft' cards in to various public officials of the Department of Justice, the State or National Headquarters of Selective Service System, or directly to local boards. By agreement with the Department of Justice, registrants who turned in cards (as contrasted to those who burned cards) were not prosecuted under section 12(a) of the Military Selective Service Law of 1967, but were processed administratively by the local boards. In many instances, the local boards determined that a deferment of such registrant was no longer in the national interest, and he was reclassified I-A delinquent for failure to perform a duty required of him under the Act, namely retaining in his possession the Registration Card and current Notice of Classification card."

Hershey, *Legal Aspects of Selective Service* 46-47 (1969).

This claimed power—to ease the burden on the criminal courts by stripping rule-violators of their deferment or exemptions and then giving them the Hobson's choice (termed an "opportunity") between reporting for induction and being prosecuted for not doing so—is exercised under the regulations entirely at the discretion of the local board, without statutory or regulatory standards to define the kinds of conduct which make delinquency declaration appropriate, or to guide the board in determining which registrants who are in technical default should be declared delinquent and when if ever should be removed from that status.

This Court noted in *Oestereich v. Selective Service Board*, 393 U.S. at 236-237, that "Congress did not define delinquency; not did it provide any standards for its definition by the Selective Service System." Moreover, the Court, holding that Congress has not authorized revocation of statutory exemptions under the delinquency power, left open the question whether the delinquency power was authorized at all by the statute under which the Selective Service System is to operate. Petitioners contend that it is not.

We begin with the proposition that a deferment or exemption is a valuable right granted by statute or administrative regulation. Similarly, the order of call preference under 32 C.F.R. § 1631.7(a) which was taken from petitioner Gutknecht by the declaration of delinquency is a valuable right extended by the Congress, which in the 1967 renewal of the conscription law mandated the President to retain the "oldest first" order of call then in effect, and prohibited institution of a random selection system. Military Selective Service Act of 1967, § 5(a) (2), 50 U.S.C. App. § 455(a)(2). The rights of which the petitioners in this case and *Breen*, No. 65, were deprived by the declaration of delinquency cannot be distinguished away by terming them merely the products of legislative or administrative grace. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439 (1968); Tigar & Zweben, *The Selective Service System: Some Certain Problems and Some Tentative Answers*, 37 Geo. Wash. L. Rev. 510, 527-28 (1969). Even if the "rights" of which petitioners Gutknecht and Breen were deprived cannot be said to be "statutory" rights, they are clearly benefits granted by

administrative regulation under standards prescribed by Congress with some precision in areas of paramount Congressional concern. Even though Congress has expressed in the legislative history and the act itself its desire to prevent the President from tinkering with the order of call,¹⁸ the delinquency regulations provide that the board shall ignore the order of call in every case. And a fair reading even of sections of the Act authorizing the President to make rules concerning deferments fails to show a Congressional design that such power should be used to provide for revocation of deferments on grounds unrelated to their grant or denial or not generally applicable to an entire class of deferred persons. It is simply not rational to believe that Congress authorized stripping registrants of rights for which it so carefully provided without some positive sign of Congressional intention. *Cf. Kent v. Dulles*, 357 U.S. 116 (1958).^{18a}

Nor must one forget that the Selective Service System's own characterization of delinquency as designed to "prevent prosecutions . . . for minor infractions of rules", quoted *supra*, acknowledges what is clear from the face of the regulations and from the facts of their administration: The delinquency regulations punish or penalize a registrant for rule violations.

¹⁸See H.R. Rep. No. 346, 90th Cong., 1st Sess. at 9-10 (1967) (language of § 5(a)(2) intended to prevent institution of random selection system).

^{18a}Indeed, § 6(k) of the Act, 50 U.S.C. App. § 456(k) provides that "No . . . exemption or deferment from training and service, under this title, shall continue after the cause therefore ceases to exist." This is but another way of saying that a deferment or exemption *should* continue *until* the cause therefor ceases to exist.

The question, therefore, is whether the Congress has authorized a civil administrative system of penalties for rule violations, to be invoked at the discretion of local boards. One indication that such a system has not been authorized is that petitioner has been unable to find a single other instance of an administrative agency claiming to possess such power without an express statutory authorization for it. The civil fraud penalties construed in *Helvering v. Mitchell*, 303 U.S. 391 (1938) were established by statute. The divestiture of citizenship provisions held unconstitutional in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), had their provenance in the Immigration and Nationality Act. See generally Jaffe, *Judicial Control of Administrative Action* 109-19 (1965).

Moreover, given the absence of procedural protections—counsel, confrontation, cross-examination—in the delinquency regulations, and the severity of the sanction they impose, the Court should not uphold them absent the most careful and explicit grant of authority in the enabling legislation. *Cf. Greene v. McElroy*, 360 U.S. 474 (1959); *Schneider v. Smith*, 390 U.S. 17 (1968). This Court remarked in *Oestereich* upon the absence of such a grant of authority, 393 U.S. at 236-237, and the Solicitor General in his brief in that case went even further:

"It is difficult to believe that Congress intended the local boards to have the unfettered discretion to decide that any violation of the Act or regulations warrants a declaration of delinquency, reclassification and induction. . . ." Brief for the United States, p. 54.

The Solicitor General also remarked not unfavorably upon the opinion of Judge Dooling in *United States v. Eisdorfer*, 1 Sel. Serv. L. Rep. 3115 (E.D. N.Y. 1968), that "The delinquency regulations, moreover, disregard the structure of the Act; deferments and priorities-or-induction, adopted in the public interest, are treated as if they were forfeitable personal privileges." *Id.* at 3116.

Petitioner recognizes that a 1967 amendment to the Act speaks of "delinquents". Military Selective Service Act of 1967, § 6(h)(1), 50 U.S.C. App. § 456(h)-(1). But this reference has to do only with order of call, and with order of call only in the event that the President institutes a call by "age groups," under 32 C.F.R. § 1631.7(b), which he has never done. Moreover, the reference to "delinquents" could as easily have been intended to refer to "undeclared delinquents," see I, A, 1 *supra*, and be simply an acknowledgment that a registrant who has refused to report for or submit to induction should remain at the top of the list for induction, ahead of those who may, though older than he is, become eligible for selection subsequent to the issuance of an order to him. This Court's opinion in *Leary v. United States*, 37 U.S.L.W. 4397-4400-02, 394 U.S. (1969), cautions against conjuring with the notion of an all-knowing Congress, perennially and automatically approving every administrator's most extravagant claim to unconfined and vagrant power merely by renewing his general grant of authority over a particular field. This argument gathers force from the express language of § 5(a) of the Act, 50 U.S.C. App. § 455(a), which permits the President to select and induct only men not "deferred or exempt."

The history of the delinquency regulations, and their gradual shift of emphasis from a reporting function, through a standardized and definite punitive function, to today's entirely discretionary and standardless grant of a roving commission to find and punish alleged violators, bespeaks the administrator's gradual and piecemeal enlargement of his domain, with little regard for Congressional authorization or approval. The situation here is rather like that in *Kent v. Dulles*, 357 U.S. 116 (1958), another case in which an administrator's zeal was found to have carried him beyond his Congressionally-derived powers.

The delinquency regulations must, therefore, be held invalid because the Military Selective Service Act does not authorize the President to make them.

C. If Congress Authorized the Making of Delinquency Regulations, the Delegation Is Void for Want of Standards to Guide the President in Making Rules and Local Boards in Enforcing Them.

Even a casual reading of the delinquency regulations must freshen the meaning of Justice Cardozo's perception concerning "unconfined and vagrant" power, "not canalized within banks to keep it from overflowing." *Schechter v. United States*, 295 U.S. 495, 551 (1935) (concurring opinion). To begin, the single word "delinquents" in § 6(h)(1) of the Military Selective Service Act seems hardly calculated to inform the President's discretion in making regulations or that of the local boards in carrying them out. If the delegation is to be sustained, it must be upon the theory of cases such as *Fahey v. Mallonee*, 332 U.S. 245 (1947),

validating an arguably overboard delegation based upon "history and customs," 332 U.S. at 254, or *Yakus v. United States*, 321 U.S. 414, 426 (1944), upholding the Office of Price Administration legislation in part because "the standards . . . with the aid of the 'statement of considerations' required to be made by the Administrator, are sufficiently definite and precise to enable Congress, the courts and the public to ascertain whether the Administrator, in fixing those prices, has conformed to those standards." But neither the *Fahey* nor *Yakus* rationales apply to the Selective Service System. There is no known "custom and usage" in the administration of the System, for local boards are not required to give any reasons for their decisions. Millions of classification decisions have been made by local boards, but the courts have almost uniformly held that in all but the narrowest of circumstances the board's decision need be expressed only as a classification symbol. See generally, Shattuck, *Record-Keeping Obligations of Local Boards*, 1 Sel. Serv. L. Rep. 4015 (1968). Cf. Rosenblum, *Low Visibility Decision Making by Administrative Agencies: The Problem of Radio Spectrum Allocation*, Ad. Law Rev., Fall 1965, at 19; Tigar & Zweben, *supra* at 525-31. Moreover, the Act does not require the President, in making regulations, to give reasons or a "statement of considerations." Indeed, it exempts the System entirely from the rule-making and adjudicatory provisions of the Administrative Procedure Act. Military Selective Service Act of 1967, § 13(b), 50 U.S.C. App. § 463(b). See *United States v. Robel*, 389 U.S. 258, 269-82 (1967) (Brennan, J., concurring).

Nor can this delegation somehow be held to survive based upon the President's plenary powers in the con-

duct of the nation's defense. Whatever might be those powers in time of war, or even of total national mobilization absent a declaration of war (the legality of which would of course be open to some question), it is clear that today the Selective Service System operates as a means of classifying men with an eye both to induction and to deferment, with careful attention to the needs of both the military and civilian economy. The change in the title of the Act in 1967 from the "Universal Military Training and Service Act" to the "Military Selective Service Act of 1967" was intended to betoken a Congressional judgment that the character of service is "selective." See Civilian Advisory Panel on Military Manpower Procurement, Report to Committee on Armed Services, 90th Cong., 1st Sess. at 10 (Comm. Print 1967). In World War II, the need was urgent to raise a large army and raise it quickly: Today, there is no grave and immediate danger to the public safety which would justify the Congress in abdicating so utterly its primary Constitutional power "to raise armies." Cf. *Kent v. Dulles*, 357 U.S. 116 (1958). It is open to serious doubt that even in time of war the Congress could hand over to the Executive, absolutely without limit, its Article I responsibilities in the matter of the military establishment. *United States v. Robel*, *supra*. Indeed, it would be a serious mistake to regard the "war power" as even relevant to decision in this case. First, the war power does not exist as such, but rather as a collection of powers given the Executive for use in the conduct of foreign affairs and as commander-in-chief of those already in the military. Congress, by the emphatic terms of Article I, is given the sole power to raise an army. This power was thought so important to the constitutional system of

checks and balances as to warrant extensive discussion in the Federalist papers. See Federalist Nos. 24-29. The root question in this case, therefore, is whether the Congress has delegated its power, and if so whether the delegation is sufficiently precise to permit the recipient of the power to use it in harmony with the Congressional will and the courts to judge whether the Congressional will is being carried out in particular exercises of the power. The use of the single word "delinquents" seems hardly calculated to inform any administrator's discretion.

Therefore, because the purported Congressional delegation is unduly broad, and because no custom, usage, history, or requirement of justification limits the use of the power granted, it is void, as are the regulations made in purported reliance upon it.

D. Even if the Regulations Are Authorized by Statute, and the Delegation Is Not Unduly Broad, the Delinquency Regulations Are Void for Vagueness and Overbreadth.

The delinquency regulations were recently described as follows by a federal district court judge who held them invalid:

"Although the imposed duties range widely in importance and in the inherent probability that non-compliance will be willful or will be damaging to the just administration of the selective service system, if there is any failure to perform any duty, 'the local board may declare [the registrant] to be delinquent' whether the failure is the result of innocent inadvertence, reasonable misinterpretation, negligence, willful disobedience rooted in principle,

or malign evasion. 32 C.F.R. § 1642(a). There are no degrees of delinquency. No standards prescribe the particular occasions when the power is to be exerted, or what findings of gravity, of willfulness, of penitence, or reparation are relevant to deciding whether or not to declare the registrant delinquent. It does not help that the regulations may not be insupportably vague in describing the duties imposed. The fault is in the mere absence of any standard or guide to the evaluation of the importance of the omitted duty and the guilt-character of the omission to perform it. . . . [T]he regulations contemplate only one kind of delinquency with one consequence for all cases in which the status is acted upon, and there is no alternative except complete remission again by local board action taken at unbounded discretion." *United States v. Eisdorfer*, 1 Sel. Serv. L. Rep. 3115, 3116 (E.D.N.Y. 1968). And see *United States v. Eisdorfer*, 2 SSJR 3002 (E.D.N.Y. 1969).

The above description of the regulations was placed before the Court for its consideration in *Oestereich*, *supra*, in the appendix to the Solicitor General's brief, but *Oestereich* did not require the Court to confront the broader issues concerning the validity of the regulations which the district court ultimately found necessary to its decision in *Eisdorfer*. Now the issue is here again, and petitioner contends that even if delinquency regulations are authorized by a valid statutory grant, the present regulations are void for vagueness. The President has visited upon the local draft boards an ostensibly limitless power to keep registrants guessing about the impact of even minor departures from

the regulations. A minor delay in reporting a change of address, occupation or physical condition, equally with more serious breaches of duty, may trigger an irreversible process resulting swiftly in the registrant's involuntary confinement in the military for two years or more.¹⁹ The possibilities of discriminatory enforcement inherent in such a scheme must give pause, particularly in the face of the System's record of abusing the delinquency power to meddle with first amendment rights. A dissentient registrant must be temerarious indeed to invite precipitous induction and take his chances on judicial review. But whether or not free speech is held to be at stake, the regulations must fail for want of an intelligible standard to guide the board in its decision. Petitioner discusses these questions in turn.

1. The Regulations Give Boards Unwarranted Discretion to Meddle With Free Speech.

The delinquency regulations have been used to threaten and to punish constitutionally protected speech, and the officials of the Selective Service System have approved of this use.²⁰ See *Nat'l Students Ass'n v. Hershey*, F. 2d, 2 Sel. Serv. L. Rep. 3030 (D.C. Cir. 1969); *Wolff v. Selective Service Local Board No. 15*, 372 F. 2d 817 (2d Cir. 1967); Appendix B, *infra*. It is argued below that they were so used in this case.

¹⁹We trust that there is no argument as to whether being in the military is confinement, for this Court has traditionally recognized that habeas corpus is available to test unlawful induction, most recently in *Oestereich*, 393 U.S. at 235.

²⁰*Cf. Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886):

"[T]hey are applied by the public authorities . . . with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws. . . ."

Cf. also Oestereich v. Selective Service Board, 393 U.S. 233 (1968). The breadth and vagueness of the regulations permits this result, and even though the Court may rule against petitioner on the merits of *his* first amendment claim, the fear that rights will be restricted *sub silentio* by vague and overbroad rules of conduct has often led this Court to depart from the general rule that one may not question the constitutionality of a provision as it may be applied to others, and to consider possible fact situations other than that before it. See, *e.g.*, *NAACP v. Button*, 371 U.S. 415, 432-33 (1963); *Freedman v. Maryland*, 380 U.S. 51 (1965); Comment, 54 Calif. L. Rev. 132, 148 (1966).²¹ See also *Soglin v. Kaufman*, 286 F. Supp. 851 (W.D. Wisc. 1968).

The board's power under the delinquency regulations is little different from that found objectionable in *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), in which this Court struck down an informal censorship scheme which Rhode Island had superimposed upon the criminal process. The sole difference between this case and *Bantam Books* is that since 1943 local boards have not been limited to exhortatory pronouncements to comply with the law. Here, as in *Bantam Books*, the regulatory scheme has a proven record of adverse impact upon speech. *Nat'l Students Ass'n v. Hershey*, *supra*. Here, as there, the standards are vague. Here, as there, the agency "has done nothing to make [its mandate] more precise." 372 U.S. at 71. And, as is argued extensively *infra*, here as in *Bantam Books* the procedures employed are not "hedged about with the safeguards

²¹The cited comment contains an excellent analysis of the first amendment doctrines of vagueness and overbreadth.

of the criminal process." *Id.* Quite simply, in the words of a student author characterizing the vice of Rhode Island's censor board, "Conduct may be circumscribed by an administrative determination which, if acquiesced in, precludes a judicial determination of whether the conduct intended or committed constitutes a protected form of expression." 54 Calif. L. Rev. at 153-154. *Cf. Freedman v. Maryland*, 380 U.S. 51 (1965).²² Because of the actual and potential impact of the delinquency regulations upon the protected freedoms of speech and association, they must be held invalid unless, at a minimum, they contain "appropriate standards" to guide the local board's action. *Kunz v. New York*, 340 U.S. 290, 295 (1951). See also *Cox v. Louisiana*, 379 U.S. 536, 557 (1965); *Niemotko v. Maryland*, 340 U.S. 268 (1951); *Saia v. New York*, 334 U.S. 558 (1948); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

Nor will the first amendment permit the System to rely upon judicial and administrative limitations upon the delinquency power to save its regulations from invalidity. *Dombrowski v. Pfister*, 380 U.S. 459 (1965), held that decisional elaboration of standards can have no place in the law of the first amendment:

"If the rule were otherwise, the contours of regulations would have to be hammered out case by case—and tested only by those hardy enough to risk criminal prosecution to determine the proper scope of regulation." *Id.* at 487.

²²The unavailability of judicial review prior to induction in all but exceptional situations, compare *Oestereich v. Selective Service Board*, 393 U.S. 233 (1968) with *Clark v. Gabriel*, 393 U.S. 256 (1968), reinforces the potentially intimidating aspect of the delinquency regulations and renders them all the more subject to constitutional infirmity.

Even had the rule reaffirmed in *Dombrowski* never been made, the delinquency regulations could not stand. Because selective service regulations are not made in conformity with the Administrative Procedure Act, and because local boards need give no reasons for their decisions, there are no regulations, directives, reports of decisions or other administrative materials which define and limit the delinquency power.²³

Each of the 4092 local draft boards, untrained in the law and often impatient with the rights of registrants, is free to make up its own mind in every case as to what constitutes delinquency and what does not, with only the narrowest review. See generally Davis & Dolbeare, *Little Groups of Neighbors* (1968) (a detailed statistical study of local board performance).

Moreover, neither the Justice Department nor the Selective Service System has ever attempted to explain why so sweeping a system of control as is contained in the delinquency regulations is necessary to compel compliance with the Military Selective Service Act and its implementing regulations, particularly given the express judgment of Congress that the *federal courts* shall be relied upon "for enforcement purposes." *Estep v. United States*, 327 U.S. 114, 119 (1946). Even in time of war—in 1943—the regulations were far more precise than in their present version. See I, A *supra*. In short, the government has not shown—and petitioner believes cannot show—that a regulatory scheme posing less danger to protected freedoms would not suffice:

"Since this case involves a personal liberty protected by the Bill of Rights, we believe that the

²³There is an outstanding directive of the Director of Selective Service broadening the delinquency power. See Appendix B, *infra*.

proper approach must be that adopted by this Court in *NAACP v. Button*, 371 U.S. 415. . . . "The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused, or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. . . . The threat of sanctions may deter their exercise almost as potently as the actual imposition of sanctions.'" *Aptheker v. Secretary of State*, 378 U.S. 500, 516 (1964).

The "alternatives" test—the insistence upon narrow and precise standards at least until it is shown that a broader exercise of power is necessary to combat an evil—does not, this Court has recently held, give way even to assertion of a paramount interest in the nation's security or to invocation of the "war power." *United States v. Robel*, 389 U.S. 258, 263-68 (1967). See also concurring opinion of Brennan, J., 389 U.S. at 269.

2. Irrespective of Any First Amendment Claim, the Regulations Are Void for Vagueness.

While commentators have noted that different standards govern questions of vagueness when the first amendment is not at stake, *e.g.*, Amsterdam, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. Pa. L. Rev. 67, 75 (1960); Collings, *Unconstitutional Uncertainty*, 40 Cornell L. Q. 195, 218-19 (1955), this Court has insisted that every penal regulation—or every regulation the violation of which carries potential penal sanctions—adequately inform those subject to it

that certain conduct is proscribed and provide ascertainable standards by which guilt or innocence may be judged. *Lanzetta v. New Jersey*, 306 U.S. 451 (1939); *Connally v. General Constr. Co.*, 269 U.S. 385 (1926); *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966); *Screws v. United States*, 325 U.S. 91 (1943).

As the court noted in *Eisdorfer*, *supra*, the delinquency regulations provide no warning to the potential violator, and no ascertainable standards of guilt. First, the board may or may not act upon a given violation, and is given no standards to use in making that determination. Second, no requirement that the failure to perform a duty be "wilful" or "intentional" interposes itself to limit the board's discretion. *Cf. Screws v. United States*, *supra*.²⁴ The registrant declared delinquent finds himself caught up in a penal regulatory system quite beyond his control, in which he is unable to predict the sort of reply which the System will make to any procedural response of his.

Nor is the registrant easily able to predict what kinds of duties may lead to imposition of delinquency status. Granted, the statute does make it his "duty" to keep the board informed of changes of address, Military Selective Service Act of 1967 § 15(b), 50 U.S.C. App. §465-

²⁴In order for a violation of "duty" to be criminally punished, as opposed to being the subject of a declaration of delinquency, it must be wilful. *United States v. Haug*, 150 F. 2d 911 (2d Cir. 1945). A substantial interest of the System must be shown to have been infringed, precluding prosecution of a registrant for, for example, a false statement on which, at the time he made it, he said he did not intend to rely. *United States v. Rubinstein*, 166 F. 2d 249, 257 (2d Cir.), *cert. denied*, 33 U.S. 868 (1948). Substantial compliance with, rather than literal adherence to, System duties is sufficient under the criminal penalty sections of the Act. *Bartchy v. United States*, 319 U.S. 484 (1943).

(b), and the regulations explicitly make it his "duty" to report for a physical examination when ordered, 23 C.F.R. § 1628.16(1969). However, the regulations dealing with possession of registration certificates and notices of classification do not contain the word "duty", and one commentator has argued based upon the history of these provisions that they do not impose a "duty" the violation of which may permissibly result in criminal prosecution. Dranitzke, *Possession of Registration Certificates and Notices of Classification by Selective Service Registrants*, 1 Sel. Serv. L. Rep. 4029 (1968), discussed at I, F, *infra*. Whatever the merits of this argument, a serious constitutional question is raised by a system of regulation which attaches severe consequences to a failure to obey indefinite commands.²⁵ See, e.g., *United States v. Robel*, 389 U.S. 258, 281-282 (1967) (Brennan, J., concurring).

Here, in short, is a system of regulatory commands which leaves men of common intelligence to guess not only at the meaning of the rules they are to follow but at the procedural devices which they must use to defend themselves against a charge of violation and to mitigate the consequences of a finding by the board that a "duty" has been ignored or violated. Such a system cannot withstand constitutional scrutiny. *Connally v. General Constr. Co.*, *supra*; *Cramp v. Bd. of Publ. Instr.*, 368 U.S. 278 (1961). See generally Amsterdam, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. Pa. L. Rev. 67 (1960).

²⁵The question of what kinds of duties the regulations define so as to give rise to criminal penalties for violation has not been discussed extensively in the cases. See, e.g., *United States v. Lembo*, 76 F. Supp. 209 (E.D. Pa.), *aff'd. sub nom. United States v. Aleli*, 170 F. 2d 18 (3d Cir. 1948). Cf. *Mogall v. United States*, 333 U.S. 424 (1948).

E. The Delinquency Regulations Are Void Because They Authorize Deprivation of Liberty Without Procedural Due Process of Law.

The delinquency regulations, as extensively discussed at I, A, *supra*, provide that a registrant's deferment or exemption is to be taken away. If he is already in a class available for service, he is accelerated for induction in violation of the order of call provisions normally followed. These benefits are taken away after a determination by the local board that the registrant has violated some "duty." Yet, a registrant who has a deferment or exemption is accorded only the most cursory review of his case by the Selective Service System, and the registrant who is at the time of the delinquency declaration in a class available for service gets no review at all. See I, A *supra*. Whether or not the declaration of delinquency is considered to be "punishment," the regulations are void because they do not provide the due process of law which this Court has customarily insisted upon as prerequisite to deprivation of governmental benefit. This contention is argued below in the alternative:

1. The Delinquency Regulations, on Their Face and as Applied, Impose Punishment in Violation of Procedural Due Process of Law.

In 1940, when the regulations served merely a reporting function, and in 1942 (as a result of the December 1941 change discussed at I, A, 3 *supra*), when they arguably served a function analogous to the civil contempt power under clearly defined standards, their remedial character²⁶ perhaps excepted them from the

²⁶And perhaps, the gravity of a wartime situation in which many liberties were for the moment undone. See *Hirabayashi v. United States*, 330 U.S. 81 (1943).

normal requirements of due process. Today, the breadth of the regulations and the manner of their use by the Selective Service System leaves no doubt that they are punitive under the tests applied in the decisions of this Court.

First, the delinquency regulations do not provide for revocation of a benefit upon grounds related to the merits of granting of it in the first place. They are used to deal with all manner of violations of the regulations, from turning in draft cards to failure to report changes of address, to (in recent times) vocal opposition to the foreign policy of the United States. See *Nat'l Students Ass'n v. Hershey*, F. 2d, 2 Sel. Serv. L. Rep. 3030 (D.C. Cir. 1969). They are not simply rules such as those customarily and logically related to the grant or denial of a benefit or license, but serve—on their face and as applied—a broader interest in punishing “infractions.”²⁷ Indeed, the correspondence between the Justice Department and the Selective Service System set out in the Appendix at 39-43, and the letter from the Selective Service System National Headquarters set out in Supplemental Brief in Support of Petition for Certiorari in this case and in Nos. 1114 and 1175, O.T. 1968, show the punitive intent with which the System administers the delinquency regulations. This use of the regulations, going far beyond the needs of any possible “alternative” nonpunitive purpose, *Kennedy v. Mendoza-Martinez*, 372 U.S. at 168, render the regulations punitive under the test set out in *Cummings v. Missouri*, 71 U.S. 277 (1866), and approved in *Kennedy*, 372 U.S. at 169 n. 27-29.

²⁷Hershey, Legal Aspects of Selective Service 46-47 (1969), quoted *supra* at I, B.

Moreover, the regulations are used to fulfill the historic purposes of punishment—retribution and deterrence. *Kennedy v. Mendoza-Martinez*, 372 U.S. at 168. Their retributive character may be seen in their failure to provide for remission of delinquency other than in the local board's untrammelled discretion, thus permitting use of the delinquency power to sanction past conduct which the registrant can in no way repair, remit or undo. Retributive zeal fairly shines through the System's use of the delinquency power under the circumstances present in *Nat'l Students Ass'n v. Hershey*, F. 2d, 2 Sel. Serv. L. Rep. 3030 (D.C. Cir. 1969) and *Wolff v. Selective Service Local Bd. No. 15*, 372 F. 2d 817 (2d Cir. 1967). The widely-publicized abuse in *Wolff*, and the prescription for punishment declared void in the *Student Association* case, gain the delinquency power a fearsome deterrent effect. Papers all across the land published the letter and Local Board Memorandum which were the basis for the boards' action in this case and in *Breen*, chilling dissent by all but the hardest among the nation's 36 million selective service registrants.

Another of the *Mendoza-Martinez* tests of a punitive sanction, 372 U.S. at 168, is whether it "comes into play only on a finding of scienter." In the midst of World War II, as noted at I, B, 2, *supra*, delinquency was not curable if the local board made a finding of scienter. One may surmise that local boards are still influenced to some degree by their perception of the registrant's intent, but the standardlessness of the regulations and the absence of any requirement that the board make findings of fact renders it impossible to say that scienter is *required* in every declaration of de-

linquency. The Act requires scienter for a finding of guilt in a criminal prosecution for failure to perform a duty, however, see note 24 *supra*, and it would be odd indeed to permit the sweeping breadth of the regulations to argue for their nonpunitive character when their punitive potential and retributive administration otherwise appear.

Finally in assessing the punitive character of the regulations, the Court should note the character of the sanction imposed—loss of liberty. This case does not involve a mere money penalty—although *Lipke v. Lederer*, 259 U.S. 557 (1922), teaches that a money exaction may yet be invalid as a penalty imposed without proper safeguards. Rather, at issue in these cases is involuntary confinement of one who would not otherwise be called to serve or who would at the least have a greater or lesser period of time at large during which he might become eligible for a deferment or during which the war or conscription or both might be halted.

In short, the Court cannot ignore in this case any more than in *Leary v. United States*, 394 U.S. (1969), the plain truth: This system of rules, like that in *Leary*, is enacted in aid of the prosecutive function of government and just as surely as that at issue in *Leary* constitutes an attempt to shortcut the essential safeguards which the Bill of Rights places around a criminal trial. A crucial difference is this: In *Leary* the rules and statutes in question sought to shorten the trial by making the defendant the instrument of his own conviction; the delinquency regulations propose to eliminate the trial altogether. *Cf. Wright*, Book Review, 78 Yale L. J. 338 (1968).

The regulations do provide for notice of delinquency. 32 C.F.R. § 1642.4 (1969). See Appendix at 44. However, no particular form of notice is required. The sixth amendment requires appraisal in a criminal case. See *Russell v. United States*, 369 U.S. 749 (1963). A registrant reclassified as a delinquent will have a personal appearance before the local board (if, that is, he can afford to travel to the local board). See note 6 *supra*. Those who, like petitioner Gutknecht, are already in a class available for service have no such right. In neither case will the registrant have the right to confront and cross-examine the witnesses against him, a right which he would have if tried on a criminal charge. See *Pointer v. Texas*, 380 U.S. 400 (1965).

By contrast, the local board is free to rely upon whatever rumor, report or hearsay may have found its way into the registrant's selective service file. See 32 C.F.R. § 1623.1(b) (1969); Sel. Serv. L. Rep., Practice Manual ¶¶ 1072-76. The right to counsel is guaranteed every criminal defendant in a criminal case, *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Gideon v. Wainwright*, 372 U.S. 335 (1963), from the moment he is formally charged, *Massiah v. United States*, 377 U.S. 201 (1964), or placed in custody, *Miranda v. Arizona*, 384 U.S. 436 (1966). The Selective Service regulations are generally interpreted to deny the registrant counsel. 32 C.F.R. § 1624.1(b) (1969). The criminal defendant will have compulsory process for obtaining witnesses in his defense, but the local board is the only party to a delinquency proceeding with the subpoena power. 32 C.F.R. § 1621.15 (1969). The local selective service board has "discretion" whether to hear witnesses. 32 C.F.R. § 1624.1(b) (1969); *Uffleman v. United States*,

230 F. 2d 297 (9th Cir. 1956); *Harris v. Ross*, 146 F. 2d 355 (5th Cir. 1944). Every accused in a criminal case is guaranteed a public trial, U.S. Const., 6th amendment; *In re Oliver*, 333 U.S. 257 (1948), yet the local board may or may not admit a registrant's friends and family, let alone the press and the general public. 32 C.F.R. § 1624.1(b) (1969).^{27a}

In short, if the delinquency regulations impose punishment, they do so without any of the safeguards which must accompany the imposition of punishment. They are, therefore, void. *Kennedy v. Mendoza-Martinez*, *supra*.

2. Even if the Delinquency Regulations Do Not Impose Punishment, They Are Invalid for Failure to Provide Procedural Due Process of Law.

Perhaps the Court will hold that the delinquency regulations do not impose punishment but merely condition the continued enjoyment of a benefit upon compliance with every requirement of the Selective Service regulations which the wit of a local board can classify as a "duty." If so, the regulations are nonetheless invalid, for even governmental benefits customarily (though mistakenly) denominated "privileges" may not be taken away by a method or under a standard which the Bill of Rights interdicts. *Sherbert v. Verner*, 374 U.S. 398 (1963); Van Alstyne, *The Demise of the Right-Privilege Distinction In Constitutional Law*, 81 Harv. L. Rev. 1439 (1969); Linde, *Justice Douglas on Freedom in the Welfare State: Constitutional Rights in the Public Sector*, 39 Wash. L. Rev. 4 (1964), 40 Wash. L. Rev. 10

^{27a}The delinquency regulations do not provide that a registrant's silence may not be used as the basis of an adverse inference, or for jury trial or indictment by a grand jury.

(1965); O'Neil, *Unconstitutional Conditions: Welfare Benefits With Strings Attached*, 54 Calif. L. Rev. 443 (1966). The question whether a board may apply the delinquency regulations based upon improper substantive criteria was at issue in *Oestereich v. Selective Service Board*, 393 U.S. 233 (1968), and is discussed *infra* at I, F. At this point, however, petitioner relies upon the cases holding that a benefit or license may not be taken away without observance of the minimal constitutional decencies of notice and hearing. See *Greene v. McElroy*, 360 U.S. 474 (1959); *In re Ruffalo*, 390 U.S. 544 (1968) Van Alstyne, *supra*, 81 Harv. L. Rev. at 1451-54.^{27b} At a minimum, these authorities teach that such elementary rights as confrontation and cross-examination as to essential facts, *Greene v. McElroy*, *supra*, notice of charges, *In re Ruffalo*, *supra*, and (where the potential sanction is serious) proof beyond a reasonable doubt, *Woodby v. I & NS*, 385 U.S. 276 (1966), are required. Whether such rights as counsel, public trial and compulsory process are required in an administrative proceeding of this character is less settled, but cases in this court involving noncriminal proceedings terminating in sanctions no more severe than in a delinquency proceeding suggest that such protections are imperative. See, *e.g.*, *In re Gault*, 387 U.S. 1 (1967); *In re Oliver*, 333 U.S. 257 (1948); *In re Murchison*, 349 U.S. 133 (1955). Cf. *Garrity v. New Jersey*, 385 U.S. 493 (1967); *Kennedy v. Mendoza-Martinez*, *supra*. And lower courts have consistently held administrators to high standards of due process

^{27b}See also *Kelly v. Wyman*, 294 F. Supp. 893 (S.D.N.Y. 1968), *prob. juris. noted sub nom. Goldberg v. Kelly*, 37 U.S. L.W. 3399 (Apr. 21, 1969).

performance. See, e.g., *Dixon v. Alabama St. Bd. of Educ.*, 294 F. 2d 150 (5th Cir. 1961); Symposium, *Student Rights and Campus Rules*, 54 Calif. L. Rev. 1 (1966).

The imposition of these procedural requirements is, in fact, indispensable to ensuring that improper substantive criteria are not used, or proper substantive criteria are not wrongly applied, in stripping those otherwise eligible of their rights under statute or regulation.²⁸ The boards' denial of these elementary protections invalidates their actions, and the regulations' failure to call for them makes them constitutionally infirm.

F. Use of the Delinquency Power to Reclassify Petitioner and Accelerate His Induction Infringed Upon the First Amendment.

1. **Under the Facts of This Case, It Is Impossible to Determine Whether the Local Board Acted in Partial Reliance Upon an Invalid Directive From the Director of Selective Service and the Conviction Must Therefore Be Reversed.**

The October 24, 1967 directive from General Hershey, the Director of Selective Service (Appendix B, *infra*), mandated local draft boards to use the delinquency power to punish dissent. While portions of the directive dealt with destruction and mutilation of selective service certificates, other portions dealt with reclassification based upon participation in demonstrations which a local board found to be "illegal."

²⁸Indeed, the boards' failure here and in *Breen* to assign formal reasons for their decisions should lead to invalidation of the board orders without more. *SEC v. Chenery Corp.*, 318 U.S. 80 (1943).

The reclassifications in this case and in *Breen*, No. 65 were apparently premised upon the Hershey directive, so closely did they follow upon its distribution. In *Breen*, the complaint alleges board reliance upon the directive, and the government has moved to dismiss, thereby admitting the allegation. *Oestereich v. Selective Service Board*, 393 U.S. 233, 235 n.3 (1968). Since no trial on the merits has been held, the point must be taken to have been established. In Gutknecht's case, the correspondence between the State Director and the United States Attorney, Appendix 41-43, which sets out the information before the draft board, indicates that the board at least had evidence before it of constitutionally protected conduct by Gutknecht in which he engaged simultaneously with his abandonment of his Selective Service certificate.

Moreover, the local boards in both cases expressed their reclassification decisions as a "general verdict" of "I-A delinquent" and "ordered to report for induction" without explanation of the grounds upon which the decision was reached. Thus, irrespective of whether a draft card turn-in is constitutionally protected, such conduct cannot be made the subject of punishment when brigaded with clearly-protected speech unless the trier of fact clearly spells out the grounds upon which he acts and indicates nonreliance upon a constitutionally impermissible ground. See *Street v. New York*, U.S. (1969), and cases there cited; *Sicurella v. United States*, 348 U.S. 385 (1955).

Nor does it matter that in each case the board issued a delinquency notice setting out the registrant's failure to possess his selective service certificates (Appendix, p. 44). For *Street* makes clear that the cru-

cial test is the content of the *verdict* in question rather than of the charge. This principle is not only an essential attribute of any fair administrative procedure, see *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943), but is necessary to the protection of the first amendment liberties at stake here. The Court has recognized this principle in a related context. In *Sicurella v. United States*, 348 U.S. 385 (1955), an erroneous view of the law in a nonbinding recommendation of a Justice Department official invalidated the action of the appeal board to which the recommendation was made. The Court could not tell whether and to what extent the board might have been influenced by the error. So here, the Hershey directive so poisons the record in these cases that only invalidation of the boards' orders, followed by relitigation if the boards wish it, will cure the error.

The reclassification and priority induction of Gutknecht and Breen may also be seen to fall afoul of the first amendment by reference to the integral interrelationship between the Hershey directive and the so-called "possession regulations," 32 C.F.R. §§1617.1, 1623.5 (1969). The directive is aimed at suppressing speech; it and the possession regulations thus form, in the context of protest-motivated draft card turn-ins such as are involved in this case and *Breen*, an incommutable system of regulation which is overly broad and vague and therefore is unconstitutional under *Stromberg v. California*, 283 U.S. 359 (1931). *Stromberg*, as interpreted in Chief Justice Warren's opinion for the Court in *United States v. O'Brien*, 391 U.S. 367 (1968), "struck down a statutory phrase which punished people who expressed their 'opposition to organi-

zation government' by displaying 'any flag, badge, banner, or device.' Since the statute there was aimed at suppressing communication it could not be sustained as a regulation of noncommunicative conduct." 391 U.S. at 382. Thus, the *O'Brien* opinion sees *Stromberg* not essentially as a case upholding the right of "symbolic speech," but rather as one of statutory overbreadth. Here, too, the regulations at issue and the Hershey directives construing them constitute an overbroad and vague set of proscriptions which the Court should strike down in its entirety rather than rewriting. See *Aptheker v. Secretary of State*, 378 U.S. 500, 516 (1964).²⁹

2. Turning in One's Own "Draft Cards" as a Gesture of Peaceful Protest Is Conduct Protected by the First Amendment.

If the Court should not accept the argument tendered in I, E, 1, *supra*, it will become necessary to confront the crucial constitutional question left open in *United States v. O'Brien*, 391 U.S. 367 (1968), and decide whether or not a registrant who turns in his draft card in peaceful protest against American policy may claim the protection of the first amendment.

Certainly the draft card turn-ins here were peaceful and orderly. They did not constitute a threat to passers-by or an obstruction of traffic or of the normal func-

²⁹We trust the Court will not pause to consider any argument that the Director's October 1967 letter and Local Board Memorandum have no legal effect. In fact they have been relied upon by local boards, and though they are not of binding force, local boards may use them for guidance. See *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275 (1946); *Nat'l Student Ass'n v. Hershey*, F. 2d, 2 Sel. Serv. L. Rep. 3030 (D.C. Cir. 1969).

tioning of any person or agency in any direct or immediate sense. It is such common-sense considerations which have led this Court to permit reasonable regulation of speech brigaded with arguably nonprotected "nonspeech" conduct. See, *Bakery Drivers Local v. Wohl*, 315 U.S. 769, 776 (1942), for Justice Douglas' enduringly cogent discussion of the rationale for such regulations. On the other hand, the interest in peaceable, effective, demonstrative speech has led this Court and others to say that right to picket, to take a recurrent example of "speech plus", may override local trespass laws of general application. *Amalgamated Food Employees v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968); *Schwartz-Torrance Investment Corp. v. Bakery & Confectionary Workers Union*, 61 Cal. 2d 766, 394 P. 2d 921 (1964). The governing principles in the "speech plus" cases have not been stated in terms which admit of easy generalization. But in *O'Brien*, the Court restated the governing criteria in cases like the present one, and iterated that the governmental interest in suppressing the nonspeech elements of an integrated course of conduct involving speech must be sufficiently strong to override the speaker's interest in communicating. See 391 U.S. at 376-377. This balancing of interests is not easy to perform, but an examination of the relative interests of the petitioners here and in *Breen* and of the government leads, it is suggested, to vindication of the free speech claim in these two cases.

Petitioners Gutknecht and Breen, like many other young Americans, acted dramatically in October and November 1967 to focus attention upon the war in Vietnam and the use of the conscription power to raise an

army to fight it. It was a time of dissent and protest, and of attempts to influence a government which seemed distant and unamenable to change. An eminent group of professional men has recently referred to "the massive anonymity of government and the unmanageability of the social system" in a study of the disturbances at Columbia University. *Crisis at Columbia: Report of the Fact-Finding Commission Appointed to Investigate the Disturbances at Columbia University* 194 (Vintage ed. 1968). See also Mailer, *Miami and the Siege of Chicago* (1968); Barron, *An Emerging First Amendment Right of Access to the Media?*, 37 Geo. Wash. L. Rev. 487 (1969). In the setting of American politics in the months before Senator Eugene McCarthy entered the Presidential race, the percipient man can well say that the dramatic and controversial conduct of the anti-war and antidraft movements indispensably and indisputably pushed the issues of war and conscription to the forefront of public debate. See Sandalow, Book Review, 67 Mich. L. Rev. 599, 608-12 (1969); Velvel, *Protecting Civil Disobedience Under the First Amendment*, 37 Geo. Wash. L. Rev. 464, 481-483 (1969). This interest in communication is at least as important of the interest of the unions in the *Logan Valley* and *Schwartz-Torrance* cases, *supra*, in moving from the outer perimeter of the respective shopping centers to the walkways on which their picket signs and leaflets would be noticed by passersby. What countervailing governmental interest could be said to have been infringed by their conduct?^{20a}

^{20a}The surrender of the certificates amounted as well to a form of petition. The right to petition, as guaranteed by the first amendment, involves of necessity some tangible signification or sign of protest, that is, *conduct*.

We begin with the proposition that the nation is not now at war, without conceding that declaration of war diminishes at all the force and primacy of first amendment rights. Compare *Schenck v. United States*, 249 U.S. 47 (1919), with Meiklejohn, *Free Speech and Its Relation to Self-Government* 27 (1948). Of what use are draft cards to a peacetime system of conscription? They perform receipt and record-keeping functions, as the Court noted in *O'Brien*, 391 U.S. at 78-79. If one is stopped on the street without his registration certificate, and if the officer who stops him has reason to conduct a search, failure to show the certificate gives rise, as 32 C.F.R. § 1617.1 (1969) says, to a presumption of failure to register—a crime under § 12(a) of the Military Selective Service Act of 1967. The possession requirement is, therefore, a convenience to the *registrant*. No legitimate interest of government served by imposing a broader consequence to failure to carry the certificate than the presumption established by the regulation. Cf. *United States v. Robel*, 389 U.S. 258 (1967). In time of war or total mobilization, perhaps men will be drafted from the streets; however, during every time of crisis during which the institution of conscription has existed in this country in its present form—that is, since 1917⁸⁰—local boards have been able to more than meet their quotas by *mailing* induction orders to registrants at their last known addresses, aided by the requirement of notification of change of address in § 15(b) of the Act. 50 U.S.C. App. § 465(b). (It should also be noted that no one has ever asserted that registrants must literally comply with the possession requirement, for example, while showering or swimming.)

⁸⁰See Sel. Serv. L. Rep., Practice Manual ¶ 2.

It cannot, therefore, be said that the governmental interest in possession of draft cards by registrants is "paramount," *Thomas v. Collins*, 323 U.S. 516, 530 (1945), particularly given the existence of a system of statutory regulation designed to ensure the continuing availability of certificates through imposition of criminal penalties for their wilful destruction or mutilation. *United States v. O'Brien*, *supra*. In short, there is no reason—no precise, common-sense, nonsuppositious, nonhypothetical reason grounded in demonstrable fact—for overriding the first amendment contention of the petitioners in this case. There is not even a cogent argument proceeding from considerations of administrative convenience, let alone a "clear and present danger of a serious substantive evil that rises far above the public inconvenience, annoyance or unrest." *Terminiello v. Chicago*, 337 U.S. 1, 5 (1949).⁸¹

Therefore, the nonpossession regulations, as applied to the conduct of petitioners here and in *Breen*, are unconstitutional as in violation of the first amendment.

⁸¹In making the above argument, petitioners assume that this Court has now rejected the view that, when a balancing test is appropriate, the government may rely upon some abstract and hypothetical interest in "national security" or the "war power" as a balance weight against freedom. This sort of balancing, criticized in Frantz, *The First Amendment in the Balance*, 71 Yale L. J. 1424 (1962); Frantz, *Is the First Amendment Law?*, 51 Cal. L. Rev. 729 (1963), results almost inevitably in the defeat of the "private" interest at stake and was not favored in, e.g., *United States v. Robel*, 389 U.S. 258 (1967).

G. The Declaration of Delinquency and Acceleration of Induction in This Case Were Not Authorized by the Military Selective Service Act of 1967 and the Selective Service Regulations.

1. *Oestereich v. Selective Service Board*, 393 U.S. 233 (1968), Requires Reversal.

This Court, in *Oestereich*, harmonized the delinquency regulations with the registrant's statutory right to a divinity student exemption under § 6(g) of the Military Selective Service Act. The basis for the Court's holding is of crucial importance in this case:

"There is no suggestion in the legislative history that, when Congress has granted an exemption and a registrant meets its terms and conditions, a Board can nonetheless withhold it from him for activities or conduct not material to the grant or withdrawal of the exemption. So to hold would make the Board's freewheeling agencies meting out their brand of justice in a vindictive manner.

"Once a person registers and qualifies for a statutory exemption, we find no legislative authority to deprive him of that exemption because of conduct or activities unrelated to the merits of granting or continuing that exemption. . . .

"We deal with conduct of a local board that is basically lawless. . . . In such instances, as in the present one, there is no exercise of discretion by a Board in evaluating evidence and determining whether a claimed exemption is deserved. The case we decide today involves a clear departure by the Board from its statutory mandate. . . .

“ . . . [T]he scope of the statutory delinquency concept is not broad enough to sustain a revocation of what Congress has granted as a statutory right, or sufficiently buttressed by legislative standards . . . ” 393 U.S. at 237-38.

The parallels between this case and *Oestereich* may be seen by a brief examination of the statutory and regulatory standards governing petitioner Gutknecht's status at the time of the declaration of delinquency. The order of call provisions governing his status are discussed at I, A, 1 and I, B, *supra*, and that description need not be repeated here. The standards governing the “order of call”, like those governing ministerial exemptions, are prescribed by the Congress and require no exercise of discretion by the local board. The great Congressional concern with order of call was expressed as recently as 1967, in an amendment to § 5(a) of the Act, 50 U.S.C. App. § 455(a), designed to prohibit the President from establishing a random selection system and to preserve the “oldest first” order of call system then (as now) in effect. H.R. Rep. No. 346, 90th Cong., 1st Sess., at 9-10 (1967). Of course, even if the order of call provisions of 32 C.F.R. § 1631.7 (a) were not mandated by the Congress, the Executive Branch is constitutionally interdicted from departing from its own regulations, so a serious constitutional question is raised by the application of the delinquency regulations to sanction abrogation of precise rules of general application. See *Vitarelli v. Seaton*, 359 U.S. 535 (1959); *Service v. Dulles*, 354 U.S. 363 (1957).

Next, here as in *Oestereich* the delinquency power was invoked for reasons unrelated to the merits of

Gutknecht's placement in a relatively low position in the order of call. Here as in *Oestereich* there are no legislative standards which approve or ~~grant~~ the use of the delinquency power; the available legislative expression of intent does not appear to envision this use of the power.

For the foregoing reasons, as well as for those spelled out at greater length in the portion of the brief in *Breen*, No. 65, devoted to analysis of *Oestereich*, the delinquency regulations were misapplied in this case.

2. Possession by a Registrant of His Registration Certificate and Notice of Classification Is Not a "Duty", Violation of Which May Permissibly Result in Application of the Delinquency Regulations.

The author of Dranitzke, *Possession of Registration Certificates and Notices of Classification by Selective Service Registrants*, 1 Sel. Serv. L. Rep. 4029 (1968) has documented, based upon the history of the possession requirement, that nonpossession of registration certificates and notices of classification is not punishable under § 12 of the Military Selective Service Act of 1967, 50 U.S.C. App. § 462. The article argues that even the ostensible authorization in § 12(b)(6), making a felon of one "who knowingly violates or evades any of the provisions of this title or rules and regulations promulgated pursuant thereto relating to the issuance, transfer or possession of such certificate," refers only to wrongful possession or wrongful transfer of draft cards with regard to forgery and false identification. 1 Sel. Serv. L. Rep. at 4039.

Regardless of whether or not § 12(b)(6) makes it a crime not to possess one's cards, however, it is clear that

§ 12(a)'s generalized prohibition against failing or neglecting or refusing to perform any "duty" under the Act or regulations, which language is also used in 32 C.F.R. Part 1642 as the basis for the delinquency power, does not create a nonpossession offense. First and most obviously, § 12(a) could not be said to create an offense which the government has consistently claimed (and some courts have held), was created by § 12(b)(6). See, e.g., *United States v. Miller*, 367 F. 2d 72, 75 (2d Cir. 1966), *cert. denied*, 386 U.S. 911 (1967); *O'Brien v. United States*, 376 F. 2d 538 (1st Cir. 1967), *rev'd on other grounds*, 391 U.S. 367 (1963). Petitioner need not concede that nonpossession is an offense at all; he argues only that which is perfectly clear: If nonpossession is an offense, it is only because § 12(b)(6) makes it so, and this under accepted canons of statutory construction:

"However inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment. . . . Specific terms prevail over the general in the same or another statute which might otherwise be controlling.'" *Fourco Glass Co. v. Transmirra Prod. Corp.*, 353 U.S. 222, 228-29 (1957).

Therefore, since possession is not a "duty" under § 12 (a), it is not a "duty" under Part 1642 of the Regulations. *Wolff v. Selective Service Board No. 15*, 372 F. 2d 817 (2d Cir. 1967).

In addition, the author of the article cited above takes care to demonstrate that the possession requirement has in any case never been expressed in terms

which make it a mandatory, punishable duty. The regulations in question, 32 C.F.R. §§ 1617.1, 1623.5 (1969), do not contain either the word "duty" or the word "shall" and are otherwise barren of words suggesting an intention to attach penalties to their disregard.

It must for these reasons be clear that whatever the meaning of "duty," it does not stretch far enough to reach the conduct of petitioners Gutknecht and Breen.

3. The Delinquency Regulations, if Not Invalid Must Be Subjected to a Limiting Construction Not Employed by the Local Board in This Case.

The petitioner in *Oestereich* argued that if the delinquency regulations are valid at all, it must be as a standardized compliance-securing machinery, limited in application to enforcement of duties relevant to the classification process, providing for automatic remission of delinquency in the event of renewed compliance by the registrant, and accompanied by sufficient procedural protections to ensure due process of law. See generally Griffiths, *Punitive Reclassification of Registrants Who Turn In Their Draft Cards*, 1 Sel. Serv. L. Rep. 4001 (1968). Such an interpretation of the regulations as a means of saving them from a determination of unconstitutionality would require, petitioner has contended, rewriting them. See *Aptheker v. Secretary of State*, 378 U.S. 500 (1964). But if the Court should not accept the arguments made above, the necessity will remain to impose some limits upon the exercise of the delinquency power. The job was begun in *Oestereich*. To continue it, petitioner suggests, first, that the delinquency regulations must come to be seen as analogous to civil contempt. The delinquency regulations may be

seen to permit such an interpretation. They provide for expunging delinquency and indeed relax the ordinary rule that reopening of a registrant's classification cannot be had after issuance of an order to report for induction, thereby allowing a registrant to conform to the System's requirements right up to the last moment. The registrant is not bound by his waiver of procedural rights until the moment he is in the armed forces. Up-until that moment he can, by cooperating with the procedures which enable his local board to make appropriate classification decisions, receive consideration of his claim that he should not be considered available for immediate induction. See 32 C.F.R. § 1642.14(b). The Delinquency Notice (SSS Form No. 304) itself requests the registrant to contact his local board at once, obviously with an eye to clearing up the alleged default. Indeed, as noted in I, A, 3, *supra*, the World War II provision that a wilful delinquent could not be removed from delinquency status is no longer in effect. Yet here, as in *Breen*, the notice was followed almost immediately by an order to report for induction. See Brief for Petitioner, *Breen v. Selective Service Bd.*, No. 65, O.T. 1969.

If delinquency is a "civil" means of enabling the board to perform its classification functions, it cannot be used against one who does not possess his registration certificate or notice of classification. In no way is the Board's consideration of a registrant's current classification or its ability to communicate with the registrant impeded by the failure to possess these certificates. It follows from the fact that the possession requirement is not an integral part of the relationship between the registrant and his board that it use reclassifica-

tion as a sanction for nonpossession is to use it as punishment rather than as a "civil" means of enforcing compliance. Such use, given the absence of procedural protections in the System, would be unconstitutional. See I, E, *supra*. See also Griffiths, *supra*, 1 Sel. Serv. L. Rep. at 4009-10 nn. 72-74, 4011.

Nor is there, in this case or in *Breen*, any evidence of a routine tender to the registrants of an opportunity to purge the alleged delinquency, even upon the assumption that nonpossession is a valid basis for invoking the delinquency power. The declarations of delinquency thereby attain the character of punitive measures designed to obtain retribution for a past act which the registrant could in no way repair or undo, rather than civil compliance-securing proceedings. Failure to offer the required procedural right of "purging" the delinquency makes it impossible to speculate on this record whether the registrants would have availed themselves of it.

Finally, the Court should insist upon the observance of the procedural protections spelled out at I, E *supra*, as a precondition to any exercise of the delinquency power by local boards. The denial of procedural rights, *e.g.*, counsel, in Part 1624 of the Selective Service regulations might be held to apply only to personal appearances before the board in nondelinquency contexts, a construction warranted by the placement of these limits in the Part of the regulations dealing with such appearances.

Subject to such limits, the delinquency regulations might be brought under control and made subject to the rule of law rather than to the whim of each of the

nation's 4092 local draft boards. In any event, however, the denial to petitioners here and in *Breen* requires invalidation of the board orders which were at issue in these cases.

II.

THE DECISION OF THE COURT OF APPEALS MUST BE REVERSED SINCE NO EVIDENCE WAS PRESENTED AT TRIAL THAT THE PETITIONER EITHER (1) FAILED TO REPORT FOR INDUCTION OR (2) REFUSED TO SUBMIT TO INDUCTION. ALTERNATIVELY, THERE WAS A FATAL VARIANCE BETWEEN INDICTMENT AND PROOF.

The March 1968 indictment of the petitioner charged him with failure to perform a duty required of him by the "Universal Military Training and Service Act" and its attendant rules, regulations and directions "in that he did fail and neglect to comply with an order of his local board *to report for and submit to* induction into the armed forces . . ." (Appendix, p. 2, emphasis supplied). A charge of failure to *report* for induction necessitates proof that the defendant knowingly and wilfully failed to appear at the induction center. Both the district court and the court of appeals conceded that the petitioner did report to the induction center. A charge of failure to submit to induction necessitates proof that the defendant knowingly and wilfully refused to comply with the standard Army procedure for induction prescribed by Army Regulation 601-270, *i.e.*, that, having been informed of the penalties and the nature of the induction procedure, the defendant twice refused to take the symbolic one step forward that would have constituted his induction into the Armed Forces.

Both the district court and the court of appeals conceded that the petitioner was never given an opportunity to take the crucial one step forward.

Since it is perfectly clear from the evidence presented at trial as well as from the opinions of the District Court and the Court of Appeals that the petitioner did report to the induction center, no further discussion of the question of failure to report is necessary: The government failed to prove that the petitioner committed the offense of failure to report. Petitioner turns to a consideration of the alleged "failure to submit."

In draft prosecutions, as in other criminal cases, the prosecution must establish that the crime was committed intentionally and knowingly. 50 U.S.C. App. § 462; *Bartchy v. United States*, 319 U.S. 484 (1943); *Ward v. United States*, 344 U.S. 924 (1953); *Graves v. United States*, 252 F. 2d 878 (9th Cir. 1958); *Venus v. United States*, 266 F. 2d 386 (9th Cir. 1959); *United States v. Rabb*, 394 F. 2d 230 (3rd Cir. 1968); *Silverman v. United States*, 220 F. 2d 33 (8th Cir. 1958). This principle is derived not only from general principles of criminal law but also from the specific use of the word "knowingly" in the statutory provision under which the petitioner was indicted, 50 U.S.C. App. § 462(a).

Recognizing the crucial importance of a demonstration of intent in cases of refusal of induction, the Army has included in Army Regulation 601-270 a procedure for laying a basis for proof of intent through the overt acts of the defendant. Paragraphs 37 and 40 of this Army regulation provide for the two crucial elements of proof of intent to refuse induction: (1) warnings to the draftee of the meaning of the induction cere-

mony and the penalties for refusal of induction and (2) presentation of the draftee with a choice between two overt patterns of behavior, *i.e.*, stepping across or refusing to step across a symbolic induction line marking the boundary between civilian and military status. See *Billings v. Truesdell*, 321 U.S. 542 (1944). The second element forces the draftee to engage in an overt pattern of behavior that constitutes the offense of refusal and overtly demonstrates the mental state of intent to refuse induction, while the first element limits the draftee's opportunity to claim at trial that he did not understand the nature of his acts. In this case, the petitioner was given no opportunity to carry out his alleged intent to refuse induction by making the irrevocable choice not to take the one step forward.^{31a}

^{31a}The relevant portions of AR 601-270 read as follows:

"37. *Induction.* a. The following procedure will be followed in the induction of *all registrants* into the Armed Forces:

(1) Registrants who have been determined to be fully qualified for induction in all respects will be assembled. The induction officer will inform them of the imminence of induction, quoting the following:

"You are about to be inducted into the Armed Forces of the United States, in the Army, the Navy, the Air Force, or the Marine Corps, as indicated by the service announced following your name when called. You will take one step forward as your name and service are called and *such step will constitute your induction* into the Armed Forces indicated." [emphasis supplied]

(2) Any registrant who fails or refuses to step forward when his name is called will be removed quietly and courteously from the presence of the group about to be inducted and processed as prescribed in paragraph 40c."

"40. Processing steps for registrants in special categories

* * *

c. *Registrants who refuse to submit to induction.* Any registrant who has been removed from the group as prescribed in paragraph 37a(2) and who persists in his refusal to submit to induction will be informed that such refusal constitutes a felony under the provisions of the Universal

The reference in paragraph 37a of AR 601-270 to "all registrants" means that the procedure for induction there outlined is the unique method for acceptance or refusal of induction. Paragraph 37a(1) is quite explicit in its declaration that the one step forward *constitutes* induction. (See the italicized portion of paragraph 37a(1), *supra*.) The refusal of no other orders given at the induction center constitutes refusal of induction; only the refusal of the procedures outlined in paragraphs 37 and 40 constitutes refusal of induction.

At the induction center in Minneapolis, the petitioner "indicated" to the military personnel that "he had no intentions to process in any way, such as physical examination or mental" (Appendix, p. 12). He was duly informed of the regulations regarding refusal to process as well as the legal penalties for refusal of induction (*Id.*, pp. 12-13, 21). The petitioner was at no time given an opportunity to accept or refuse an order to take a symbolic step forward into military jurisdiction, as required by AR 601-270 (37)(1); nor was the statement regarding the imminence of induction read to him (*Id.*, pp. 19, 22-23). The District Court in its

Military Training and Service Act, as amended. He will be informed further that conviction of such an offense under civil proceedings will subject him to be punished by imprisonment for not more than 5 years, or a fine of not more than \$10,000, or both. He will then be informed again of the imminence of induction using the language specified in paragraph 37a(1) and his name and service number again will be called. If he steps forward at this time, he will be informed that he is a member of the Armed Forces concerned, using the language specified in paragraph 37a (3). If, however, he persists in refusing to be inducted, the following action will be taken: [the following material sets forth procedures for taking a signed statement, preparing letters to various authorities, and notifying the U.S. Attorney]"

opinion conceded that the prescribed induction procedure had not been followed.

Even assuming that one could dispense with the standard one step forward in proving intent, the government succeeded only in proving that the petitioner had indicated an intent to refuse induction; the government was unable to demonstrate that the petitioner refused to take the symbolic one step forward that *constitutes* induction according to AR 601-270(37)(1). If accepted, this evidence would establish no more than the proposition that the petitioner intended to refuse induction but was never given the opportunity to commit the offense by refusing the induction ceremony. Placing this situation within the general context of penal law, one discovers that the petitioner is simply in the position of a party who expressed an intent to commit a crime, but never carried the expressed intent into action because the opportunity did not arise, *e.g.*, an individual who declared that he would shoot any child who came on his property but never committed the crime of murder because no child ventured on his land. One can easily conceive of the case of a draftee who makes loose statements about refusing induction at the center, but who goes through with induction when confronted with the actual final choice to refuse or accept. In fact, AR 601-270 (40) (c) explicitly recognizes the possibility that a draft resister can change his mind even after having refused once. In such a case, the regulation provides for induction rather than prosecution.

Thus, it is clear that the petitioner could not have been convicted validly either of refusing to report to the induction center or of refusal of induction on the basis

of the evidence presented by the government at trial. It is possible that a charge of refusing to obey the orders of representatives of the Armed Forces at the induction center might have been more appropriate to the government's proof. (See 50 App. U.S.C. § 462-(a) 32 C.F.R. § 1632.14(4) (January 1, 1969); and T. 23).³² However, even if the proof at trial could be tortured into a showing that the petitioner failed to obey the lawful orders of military personnel at the induction center, the indictment did not charge him with that offense and he was therefore given no opportunity to defend against a charge that he committed it. Such a variance between indictment and proof was condemned in *Stirone v. United States*, 361 U.S. 212 (1969); cf. *Russell v. United States*, 369 U.S. 749 (1962). An indictment for violation of the provisions of 32 C.F.R. § 1632.14(b) would, petitioner contends, be required under the decisions of this Court to spell out the precise offense with which petitioner was charged, including if necessary to apprise him properly the regulation upon which the government would rely at trial. See *Russell v. United States*, *supra*.

In any case, however, through the Army's failure to follow its own regulations that simplify the task of the government in proving commission of the offense with

³²Even with such a charge, the government would have been proceeding on a very weak foundation of proof of intentional commission of the offense. No evidence from the trial establishes that the petitioner in fact refused to process. One has only his alleged statement that he would not. Certainly the Army would have been required to present the petitioner with the materials or personnel for the physical and mental tests before the refusal would have reached the level of a concrete act. And the Army Regulations bear out this interpretation. AR 601-270 (40) (c) (4) provides specifically for inductees who refuse to take the preinduction tests and examinations. They are to be told that their acts constitute violations of law.

intent, the petitioner never reached the stage where he could have committed the offense of refusing to submit to induction. This failure to follow procedural rules established for the draftee's protection requires reversal. See *Vitarelli v. Seaton*, 355 U.S. 535 (1959); *Cox v. Louisiana*, 379 U.S. 559 (1965).^{32a} Support for the foregoing view is provided by *United States v. Kroll*, 402 F. 2d 221, 222-23 (3rd Cir. 1968):

"First, we concur in the view expressed in *Chernehoff v. United States*, 219 F.2d 721 (C.A. 9, 1955), that a registrant is not guilty of a crime until he has been given the prescribed warning concerning penalties and refuses to step forward for the second time. See also, *United States v. Kurki*, 384 F.2d 905 (C.A. 7, 1967), cert. denied, 390 U.S. 926 (1968); *Parrott v. United States*, 370 F.2d 388 (C.A. 9, 1966), cert. denied, 387 U.S. 908 (1967). The purpose behind A.R. 601-270 is to give a registrant a chance to change his mind and to afford him one last opportunity to avoid committing a Federal crime. Were we to make the

^{32a}The Army Regulations, including AR 601-270, were promulgated under the authority of the Assistant Secretary of Defense (Manpower) and the Department of the Army as Executive Agent for the Department of Defense on August 2, 1965. As the opinion in *Chernehoff v. United States*, *supra* at p. 724, declared, the Army Regulations on induction procedures were promulgated to fill a gap left by the Code of Federal Regulations. They are not mere technicalities that the Army can dispense with as it pleases. Either the Army must induct according to its own regulations and those of the Selective Service System or it cannot induct at all. This was pointed out in *Briggs v. United States*, 397 F. 2d 370, 373 (9th Cir. 1968): "Army Regulations, like selective service regulations, constitute part of the procedural framework governing induction." See also *United States v. Kroll*, 402 F. 2d 221 (3rd Cir. 1968); *Edwards v. United States*, 395 F. 2d 453 (9th Cir. 1968), cert. den., 393 U.S. 845 (1968); and *Parrott v. United States*, 370 F. 2d 388 (9th Cir. 1966), cert. den., 387 U.S. 908 (1967).

assumption that appellant committed a crime when he first refused to step forward we would not only thwart the intention of these regulations, but we would also unnecessarily exacerbate what is already a highly sensitive area in the administration of criminal justice."

Chernekoff v. United States, 219 F. 2d 721 (9th Cir. 1955), cited in *Kroll*, is also important here. Chernekoff, like Gutknecht, was given no opportunity to go through the standard procedures for refusal of induction. In reversing the conviction, the court held, 219 F. 2d at 724-725:

"Reversal is also required because the appellant never refused to be inducted into the Armed Forces in the manner required by law in order to warrant prosecution.

"Appellant reported to the induction station as required by 32 Code Fed. Regs. § 1632.14(a). . . . As 32 Code Fed. Regs. § 1632.16 does not prescribe any method for induction, the Department of the Army has specified the procedure to be followed in Special Regulation 615-180-1.

"One purpose of this regulation is self-evident. It is intended to give a registrant a last clear chance to change his mind and accept induction rather than certain indictment and possible conviction for a felony. . . . *The regulation is couched in mandatory, not discretionary, language.* [emphasis supplied.]

"In the present case the appellant was not given the prescribed opportunity to step forward, nor the prescribed warning. The Army deemed it useless

to apply the Special Regulation to the appellant as he had said he would not if asked to do so step forward and become inducted into the Armed Forces. It does not matter that he might not have changed his mind. He should have been given the opportunity granted him by the Army's own regulation to seriously reflect and to let actions speak louder than words. . . . It is also important that the moment he become liable for civil prosecution be marked with certainty. The Special Regulation fulfills such a need."

In reference to a written statement of refusal, the court in *Chernehoff* declared:

"It amounts to no more than testimony that someone heard appellant say he would refuse to be inducted except that a statement in writing is more easily proved."

See also *Parrott v. United States*, 370 F. 2d 388, 395 (9th Cir. 1966) and *Edwards v. United States*, 295 F. 2d 453 (9th Cir. 1968).

The obvious conflict between the decision in this case below and the decision in *Chernehoff* must be resolved. Acceptance of the *Chernehoff* rule will result in the elimination of any ambiguity about the intentions or acts of the draftee.

In the opinion below, the court of appeals did not go into the question of intent or of the exact moment of the commission of the crime of refusal. The opinion draws on ambiguous language from *Billings v. Truesdell*, 321 U.S. 542, 557 (1944). Of course, as asserted

by the quotation from *Billings* cited by the Court of Appeals, a draftee who reports to the induction center and refuses induction is as guilty as a draftee who does not report at all. But the criminal acts to be proved are different in each case. And, of course, the issue in this case is whether the petitioner did in fact refuse induction, whereas the issue in *Billings* was whether the defendant could be inducted against his will and tried under military law. There was no issue in *Billings* of the proper procedure to be followed by the Army to enable proof of commission of the offense and proof of intent. Indeed, to the extent that *Billings* insists upon a precise demarcation between civilian and military status, it supports the argument made above.

The opinion of the district court treated the issue of the crucial one step forward at greater length, but misconstrued the meaning of the induction ceremony. The district court opinion alleged that the petitioner was not "charged with failure to take 'one step forward,' but with failure to comply with the Board's order to report for, and submit to, induction." The district court is simply confused as to what constitutes induction. It is clear from AR 601-270(37)(1) that the one step forward *constitutes* induction. Thus, the petitioner was in fact charged with failure to take "one step forward," *i.e.*, with failure to submit to induction.

No doubt the conjunctive phrasing of the indictment (discussed at point III, *infra*) contributed to the confusion of the court below. In charging the petitioner

with failure "to report for and submit to induction," the government made the petitioner's task in defending himself at trial quite difficult. It is simply not clear from the indictment whether the petitioner was charged with failure to report, refusal to submit, or both, and both courts below may have been misled by the indictment.

The opinion of the District Court also misconstrued the significance of the alleged refusal to take the prescribed mental and physical tests. With no basis whatsoever for its statement, the court declared that it "appears" that the one-step-forward procedure was not followed *because* the petitioner allegedly refused to take the physical and mental tests. As argued above, if it were felt that an alleged refusal to take the tests prevented the Army from attempting to induct the petitioner, then he should have been charged with failure to obey the orders of Army personnel at the center and not with refusing induction. See 50 App. U.S.C.A. § 462(a) and 32 C.F.R. § 1632.14(b). Indeed, the only cases in which the Army regulations concerning induction procedures would not apply is where the defendant failed to report to the induction center as in *United States v. Kurki*, 384 F. 2d 905 (7th Cir. 1967), *cert. den.*, 390 U.S. 926 (1968).

Because the government proved neither that the defendant failed to report for induction nor that he refused to submit to induction, because there is a fatal variance between the indictment and the government's proof at trial, and because the military authorities failed to follow their own procedural regulations in processing petitioner for induction, the conviction should be reversed.

III.

**THE INDICTMENT IN THIS CASE FAILS TO STATE
AN OFFENSE AGAINST THE UNITED STATES
IN THAT IT IS BAD FOR DUPLICITY.**

The indictment in this case charged that petitioner "did fail and neglect to comply with an order of his local board to report for and submit to induction into the armed forces." (Appendix, p. 2). By timely motion, petitioner's trial counsel challenged the indictment as duplicitous in that it charged two offenses in a single count, which motion was denied (Appendix, p. 4).

Claims that a single count of an indictment states more than one offense, in violation of F.R. Crim. P. 8(a)'s requirement that offenses be pleaded "in a separate count for each offense," run into conceptual difficulty most often because of the federal practice of conjunctive pleading³³ and the plethora of federal statutes proscribing a "course of conduct" rather than a single act. *E.g.*, *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 224 (1952). However, refusals to report for or to submit to induction do not involve a "course of conduct," and we are left only with the view of the courts below that the indictment in the case at bar alleges only different ways of committing one underlying offense: the failure to obey the board's order to report and submit.

Petitioner turns to an examination of this contention, for clearly if the indictment does allege two offenses, this conviction cannot stand. See *e.g.*, *Bins v. United States*, 331 F. 2d 390, 392-93 (5th Cir. 1964); 8

³³F. R. Crim. P. 7(c) permits pleading in the alternative in limited situations. An indictment in the disjunctive is bad for uncertainty.

Moore, Federal Practice § 8.03 (Cipes ed.—Crim. Rules).

When a registrant's name is reached for induction, the board sends him an order to report, SSS Form 252, setting out the date, time and place at which he is to report. If the registrant fails to report as ordered, he is guilty of an offense. See, *e.g.*, *United States v. Rabb*, 394 F. 2d 230 (3d Cir. 1968). If he reports and fails to obey the directions of those in charge of his processing, he may have committed an offense under 32 C.F.R. § 1632.14(b)(1969) as discussed in Point II, *supra*. If he reports and is found finally acceptable, refuses to step forward when his name is called, and persists in this refusal, he may also be guilty of an offense. See Point II, *supra*. Excluding from consideration the failure to obey directions at the induction center, clearly the refusal to report and the refusal to submit are separate crimes having quite different elements and raising quite different problems not only of proof but of defense. One who fails to report for induction may be precluded from raising any defenses concerning alleged errors in his processing by the board or the armed forces, or the lack of a basis in fact for his classification. See *McKart v. United States*, U.S. (1969). His state of mind may be open to far broader inquiry than in the typical case of refusal to submit to induction. See, *e.g.*, *United States v. Rabb*, *supra*, Sel. Serv. L. Rep., Practice Manual ¶ 2452.

By contrast, trials for refusal to submit to induction are typically routine considerations of alleged errors committed by the local board. There is almost never a question that the defendant did refuse to submit, nor any question that he knew what he was doing when

he refused. Generally, he will be doing no more than *Clark v. Gabriel*, 393 U.S. 256 (1968) said he must: laying the basis for judicial review of the actions of his draft board.

Nor is this a case in which alternative methods of committing the same offense must be pleaded in order to avoid a variance between indictment and proof. The question is whether the two quite disparate crimes of refusal to report and refusal to submit can be treated as but aspects of a single offense. Logically, the answer is no, and there are no considerations of governmental convenience which justify treating them in such a fashion.

More than practical wisdom and matters of convenience establish the insufficiency of the indictment, however. The sixth amendment appraisal requirement is mocked by a rule permitting the government to plead draft refusal offenses in inconsistent and essentially uninformative terms. Point II, *supra*, shows how the confusion arising from failure to plead with precision prejudiced the defendant at trial: that argument shows how petitioner was indicted for refusal to report and for refusal to submit, and tried for neither offense. Here it is suggested that the prosecutor's failure to live up to the rule in *Russell v. United States*, 369 U.S. 749 (1963), contributed to that unhappy state of events. The indictment in this case hardly permits a reviewing Court to "decide whether [the facts alleged] are sufficient in law to support a conviction." 369 U.S. at 768. While the grand jury minutes are not part of the record in this case, the opaque prose of the indictment raises, as in *Russell*, the real possibility that the petitioner was "convicted on the basis of facts not found by, and per-

haps not even presented to, the grand jury which indicted him." In short, this indictment does not "state the species . . . descend to particulars" in defining the alleged offense, and is therefore infirm.

Drawing upon the underlying theme of *Russell*—the importance of one element of the charged offense (there contempt of Congress under 2 U.S.C. § 192)—another weighty consideration comes into play in this case. *Billings v. Truesdell*, 321 U.S. 542 (1944), interpreted and emphasized the crucial difference between the penalty provisions of the 1917 and 1940 draft acts: The 1940 Act, in contrast to that of 1917, envisaged a clear line of demarcation between military and civilian status. The Army regulations construed in *Billings* carried out that Congressional intention that the line be clearly drawn. Cases such as *Estep v. United States*, 327 U.S. 114 (1946), gave the line a crucial significance in the law of selective service. The refusal to submit to induction—a potential crime committed right at the line to which the 1940 Act, *Billings* and *Estep* give such importance—is thus a completely different offense from the refusal to show up at the induction center at all. See also the renewed Congressional affirmation of the important distinction between the two offenses, Military Selective Service Act of 1967 § 10(b)(3), 50 U.S.C. App. § 460(b)(3); *Oestereich v. Selective Service Board*, 393 U.S. 233 (1968).

This legislative and judicial construction of the law reinforces the view that refusal to report and refusal to submit are entirely separate offenses which must be pleaded as such in separate counts of the indictment. The indictment in the present case sweeps them into

the same count and is therefore bad for duplicity, which is perhaps another way of saying that it fails to state an offense.

Conclusion.

For the foregoing reasons, it is respectfully prayed that the judgment of the court of appeals be reversed and the cause remanded with directions to order dismissal of the indictment or, if Point II is reached and decided favorably to petitioner, entry of a judgment of acquittal.

Respectfully submitted,

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APPENDIX A.

Statutes and Regulations Involved.

U.S. Const., amendment 1:

"Congress shall make no law . . . abridging the freedom of speech. . . ."

U.S. Const., amendment 5:

". . . nor shall any person . . . be deprived of life, liberty, or property without due process of law . . ."

U.S. Const., amendment 6:

"In all criminal prosecutions, the accused shall enjoy the right of a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Military Selective Service Act of 1967, § 5(a), 50 U.S.C App. § 455(a):

"§ 455. Manner of selection of men for training and service; quotas; appointment, reappointment, or promotion of persons in medical categories

(a) (1) The selection of persons for training and service under section 4 shall be made in an impartial manner, under such rules and regulations as the President may prescribe, from the persons who are liable for such training and service and who at

the time of selection are registered and classified, but not deferred or exempted. . . .

“(2) Notwithstanding the provisions of paragraph (1) of this subsection, the President in establishing the order of induction for registrants within the various age groups found qualified for induction shall not effect any change in the method of determining the relative order of induction for such registrants within such age groups as has been heretofore established and in effect on the date of enactment of this paragraph [June 30, 1967], unless authorized by law enacted after the date of enactment of the Military Selective Service Act of 1967 [June 30, 1967].”

Military Selective Service Act of 1967, § 6(h)(1),
50 U.S.C.App. § 456(h)(1):

“. . . Any person who is in a deferred status under the provisions of subsection (i) of this section after attaining the nineteenth anniversary of the date of his birth, or who requests and is granted a student deferment under this paragraph, shall, upon the termination of such deferred status or deferment, and if qualified, be liable for induction as a registrant within the prime age group irrespective of his actual age, unless he is otherwise deferred under one of the exceptions specified in the preceding sentence. As used in this subsection, the term “prime age group” means the age group which has been designated by the President as the age group from which selections for induction into the Armed Forces are first to be made after delinquents and volunteers.”

Military Selective Service Act of 1967, § 12(a), 50 U.S.C.App. §462(a):

“ . . . [A]ny person who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in execution of this title, or rules, regulations or directions made pursuant to this title, . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than \$10,000, or by both such fine and imprisonment. . . .”

Military Selective Service Act of 1967, § 12(b)(6), 50 U.S.C. App. § 462(b)(6):

“(b) Any person . . . (6) who knowingly violates or evades any of the provisions of this title or rules or regulations promulgated pursuant thereto relating to the issuance, transfer, or possession of such certificate [registration certificate, alien’s certificate of nonresidence, or any other certificate issued pursuant to or prescribed by the provisions of this title], shall, upon conviction, be fined not to exceed \$10,000 or be imprisoned not more than five years, or both. . . .”

32 C.F.R. § 1602.4 (1969):

“A ‘delinquent’ is a person required to be registered under the selective service law who fails or neglects to perform any duty required of him under the provisions of the selective service law.”

32 C.F.R. §§ 1642.1-.46:

GENERAL

§1642.1 Regulations governing delinquents.

Delinquents, as defined in § 1602.4 of this chapter shall be governed by the provisions of this

part and such other provisions of the Selective Service Regulations as are not in conflict therewith. [E.O. 10001, 13 F.R. 5488, Sept. 21, 1948. Re-designated at 14 F.R. 5021, Aug. 13, 1949]

§1642.2 Continuing duty.

When it becomes the duty of a registrant or other person to perform an act or furnish information to a local board or other office or agency of the Selective Service System, the duty or obligation shall be a continuing duty or obligation from day to day and the failure to properly perform the act or the supplying of incorrect or false information shall in no way operate as a waiver of that continuing duty.

[E.O. 10001, 13 F.R. 5488, Sept. 21, 1948. Re-designated at 14 F.R. 5021, Aug. 13, 1949]

§ 1642.3 Compliance with procedures of this part not condition precedent to prosecution.

Compliance by a local board or any other agency of the Selective Service System with any or all of the procedures prescribed by the regulations in this part is not a condition precedent to the prosecution of any person under the provisions of section 12 of title I of the Military Selective Service Act of 1967.

[EO. 10292, 16 F.R. 9862, Sept. 28, 1951; E.O. 11360, 32 F.R. 9788, July 4, 1967]

§ 1642.4 *Declaration of delinquency status and removal therefrom.*

(a) Whenever a registrant has failed to perform any duty or duties required of him under the selective service law other than the duty to comply with an Order to Report for Induction (SSS Form No. 252) or the duty to comply with an Order to Report for Civilian Work and Statement of Employer (SSS Form No. 153), the local board may declare him to be delinquent.

(b) When the local board declares a registrant to be a delinquent, it shall enter a record of such action and the date thereof on the registrant's Classification Questionnaire (SSS Form No. 100) and shall complete a Delinquency Notice (SSS Form No. 304), in duplicate, setting forth the duty or duties which the registrant has failed to perform. The local board shall mail the original to the registrant at his last known address and file the copy in his Cover Sheet (SSS Form No. 101).

(c) A registrant who has been declared to be a delinquent may be removed from that status by the local board at any time. When the local board removes a registrant from delinquency status, it shall enter a record of such action and the date thereof on the registrant's Classification Questionnaire (SSS Form No. 100) and shall advise the registrant of such removal by letter a copy of which shall be filed in this Cover Sheet (SSS Form No. 101).

[E.O. 10659, 21 F. R. 1103, Feb. 17, 1956]

CLASSIFICATION AND INDUCTION OF DELINQUENTS

§ 1642.10 *Restriction on classification and induction of delinquents.*

No delinquent registrant shall be placed in Class I-A, Class I-A-O, or Class I-O under the provisions of section 1642.12 or shall be ordered to report for induction under the provisions of section 1642.13 or section 1631.7 of this chapter, or, in the case of a conscientious objector opposed to non-combatant training and service, order to report for civilian work in lieu of induction, unless the local board has declared him to be a delinquent in accordance with the provisions of section 1642.4 and thereafter has not removed him from such delinquency status.

[E.O. 11360, 32 F.R. 9794, July 4, 1967]

§ 1642.11 *Registration and classification of unregistered delinquents.*

Whenever a person who is a delinquent because he has not registered reports or is brought before a local board, he shall be registered in the normal manner, except that if the local board with which he registers determines that because of his delay in registering he should be declared to be a delinquent under the provisions of section 1642.4 and processed for induction as a delinquent, the local board may enter in item 2 of the Registration card (SSS Form No. 1) an address within its jurisdiction. If the local board makes such determination and retains jurisdiction of the registrant, it shall, as soon as possible after his

registration, declare the registrant to be a delinquent and classify him as provided in section 1642.12.

[E.O. 10984, 27 F.R. 202, Jan. 9, 1962]

§ 1642.12 *Classification of delinquent registrant.*

Any delinquent registrant between the ages of 18 years and 6 months and 26 years and any delinquent registrant between the ages of 26 and 28 who was deferred under the provisions of section 6(c)(2)(A) of the Military Selective Service Act of 1967 which were in effect prior to September 3, 1963, and any delinquent registrant between the ages of 26 and 35 who on June 19, 1951, was or thereafter has been or may be, deferred under any other provision of section 6 of such Act, including the provisions of subsection (c)(2)(A) in effect on and after September 3, 1963, may be classified in or reclassified into Class I-A, Class I-A-O or Class I-O, whichever is applicable, regardless of other circumstances: *Provided*. That a delinquent registrant who by reason of his service in the Armed Forces is eligible for classification into Class IV-A may not be classified or reclassified into Class I-A, Class I-A-O or Class I-O under this section unless such action is specifically authorized by the Director of Selective Service.

[E.O. 11360, 32 F.R. 9794, July 4, 1967]

§ 1642.13 *Certain delinquents to be ordered to report for induction.*

The local board shall order each delinquent registrant between the ages of 18 years and 6 months and 26 years and each delinquent registrant be-

tween the ages of 26 and 28 who was deferred under the provisions of section 6(c)(2)(A) of the Military Selective Service Act of 1967 which were in effect prior to September 3, 1963, and each delinquent registrant between the ages of 26 and 35 who on June 19, 1951, was, or thereafter has been or may be, deferred under any other provisions of section 6 of such Act, including the provisions of subsection (c)(2)(A) in effect on and after September 3, 1963, who is classified in or reclassified into Class I-A or Class I-A-O to report for induction in the manner provided in section 1631.7 of this chapter, or in the case of a delinquent registrant classified or reclassified into Class I-O, the local board shall determine the type of civilian work it is appropriate for him to perform and shall order him to perform such civilian work in lieu of induction in accordance with the provisions of Part 1660 of this chapter, unless in either case (a) it has already issued such order, or (b) pursuant to a written request of the United States Attorney, the local board determines not to order such registrant to report for induction or civilian work.

[E.O. 11360, 32 F.R. 9795, July 5, 1967]

§ 1642.14 *Personal appearance, reopening, and appeal.*

(a) When a delinquent registrant is classified in or reclassified into Class I-A, Class I-A-O or Class I-O under the provisions of this part, a personal appearance may be requested and shall be granted under the same circumstances as in any other case.

(b) The classification of a delinquent registrant who is classified in or reclassified into Class I-A,

Class I-A-O or Class I-O under the provisions of this part may be reopened at any time before induction or before the date he is to report for civilian work in the discretion of the local board without regard to the restrictions against reopening prescribed in section 1625.2 of this chapter.

(c) When a delinquent registrant is classified in or reclassified into Class I-A, Class I-A-O or Class I-O under the provisions of this part, an appeal may be taken under the same circumstances and by the same persons as in any other case.

[E.O. 11360, 32 F.R. 9795, July 4, 1967]

§ 1642.15 *Continuous duty of certain registrants to report for induction.*

Regardless of the time when or the circumstances under which a registrant fails or has failed to report for induction pursuant to an Order to Report for Induction (SSS Form 252) or pursuant to an Order for Transferred Man to Report for Induction (SSS Form 253), or fails or has failed to report for civilian work in lieu of induction pursuant to an Order to Report for Civilian Work and Statement of Employer (SSS Form 153), it shall thereafter be his continuing duty from day to day to report for induction or for civilian work in lieu of induction to his own local board, and to each local board whose area he enters or in whose area he remains.

[E.O. 11360, 32 F.R. 9795, July 4, 1967]

DELIVERY OF DELINQUENT REGISTRANTS

§ 1642.21 *Procedure.*

(a) If a delinquent registrant reports to or is brought before a local board other than his own local board, the local board to which he reports or before which he is brought shall advise his own local board by telegram or other expeditious means that the delinquent has reported to or has been brought before such local board and that he will be inducted if it is satisfactory to his own local board. The registrant's own local board shall reply by telegram or other expeditious means.

(b) If the registrant's own local board advises or if it is ascertained from the United States Department of Justice that the registrant is delinquent because he has failed to respond to an Order to Report for Induction (SSS Form No. 252) or an Order for Transferred Man to Report for Induction (SSS Form No. 253), the delinquent shall be delivered for induction and the local board to which the registrant has reported or before which he has been brought shall prepare such papers as may be necessary in order to effect such induction and forward copies thereof to the registrant's own local board. The induction of such a registrant shall be reported to the registrant's own local board in the same manner as if the registrant had been transferred for delivery to the local board from which such registrant was inducted.

(c) If a delinquent registrant who is in Class I-O reports to or is brought before a local board other than his own local board, the local board to

which he reports or before which he is brought shall advise his own local board by telegram or other expeditious means that the delinquent has reported to or has been brought before such local board, and that he will be ordered under the provisions of Part 1660 to perform civilian work deemed appropriate by such local board for the registrant to perform in lieu of induction, if it is satisfactory to his own local board. The registrant's own local board shall reply by telegram or other expeditious means.

(d) If the registrant's own local board advises that the registrant is delinquent because he has failed to respond to an Order to Report for Civilian Work and Statement of Employer (SSS Form 153), the local board at which the registrant appeared or was brought shall issue to him written instructions regarding the date and place he is to report for work and the type of work he is to perform. Whenever necessary, travel, meals and lodging may be furnished the registrant under the provisions of section 1660.21 (b) of this chapter.

(e) If the registrant's own local board advises that no Order to Report for Induction (SSS Form 252) or Order for Transferred Man to Report for Induction (SSS Form 253) or Order to Report for civilian work and Statement of Employer (SSS Form 153) has been issued to such registrant or that the registrant is no longer a delinquent, it shall advise the local board before which the registrant has appeared or has been brought of

the action to be taken with reference to such registrant.

[E.O. 10001, 13 F.R. 5488, Sept. 21, 1948; E.O. 11360, 32 F.R. 9796, July 4, 1967. Redesignated at 14 F.R. 5021, Aug. 13, 1949]

MEN IN CUSTODY

§ 1642.31 *Completing records of man liable for training and service.*

(a) Provided they are required and have not already been accomplished, the following steps shall be taken in connection with every man who has registered or who is required to register under the provisions of title I of the Military Selective Service Act of 1967, immediately upon his reporting to or being brought before a local board or immediately upon his being taken into custody or his being placed in confinement:

(1) He shall be registered; provided, that any law enforcement official or any other authorized person may act as registrar.

(2) He shall complete his Classification Questionnaire (SSS Form No. 100).

(3) He shall complete his Special Form for Conscientious Objector (SSS Form No. 150), when applicable.

(4) He shall complete all other necessary forms.

(5) He may be physically examined.

(b) If such a man is unable or refuses to fill out any form in the manner required by paragraph

(a) of this section, such form shall be filled out by a member or clerk of a local board or the super-

intendent, warden, or other law enforcement official from information gained by interviewing the delinquent and from other sources.

(c) If the signature of such man is required upon any form after it is filled out and he is unable or refuses to sign his name or make his mark upon any such form, a member or clerk of a local board or the superintendent, warden, or other law enforcement official shall sign such man's name and indicate that he has done so by signing his own name beneath the name of such man. The act of a member or clerk of a local board, or of the superintendent, warden, or other law enforcement official in so doing shall have the same force and effect as if such man had signed his name to such form.

[E.O. 10001, 13 F.R. 5488, Sept. 21, 1948, as amended by E. O. 10292, 16 F. R. 9862, Sept. 28, 1951, E.O. 11360, 32 F.R. 9788, July 4, 1967. Redesignated at 14 F.R. 5021, Aug. 13, 1949]

§ 1642.32 *Obligation of man in custody, confinement, or imprisonment.*

No man is relieved from complying with the selective service law during the time he is in custody, confinement, or imprisonment. He shall perform the duties and shall be accorded the rights and privileges of all registrants.

[E.O. 10001, 13 F.R. 5488, Sept. 21, 1948. Redesignated at 14 F.R. 5021, Aug. 13, 1949]

§ 1642.33 *Obligation of man after release from custody, confinement, or imprisonment.*

When a man is released from custody, confinement, or imprisonment, he shall immediately advise his local board of that fact and shall perform the duties and be accorded the rights and privileges of all registrants. This applies equally to a man taken into custody, confined, or imprisoned for a violation of the selective service law and to a man taken into custody, confined, or imprisoned for any other cause.

[E.O. 10001, 13 F.R. 5488, Sept. 21, 1948. Re-designated at 14 F.R. 5021, Aug. 13, 1949]

RECORDS AND REPORTS OF DELINQUENTS

§ 1642.41 *Report of delinquent to United States Attorney.*

(a) Every registrant who fails to comply with an Order to Report for Induction (SSS Form No. 252) or an Order for Transferred Man to Report for Induction (SSS Form No. 253) shall be reported promptly to the United States Attorney on Delinquent Registrant Report (SSS Form No. 301): *Provided*, That if the local board believes by reasonable effort it may be able to locate the registrant and secure his compliance, it may delay the mailing of such Delinquent Registrant Report (SSS Form No. 301) for a period not in excess of 30 days. A copy of such Delinquent Registrant Report (SSS Form No. 301) shall be placed in the delinquent's Cover Sheet (SSS Form No. 101). The local board may report any other delinquent registrant to the United States Attorney by letter

stating all the circumstances. A copy of such letter shall be placed in the delinquent's Cover Sheet (SSS Form No. 101).

(b) In endeavoring to locate and to secure the compliance of a delinquent prior to reporting him to the United States Attorney, the local board should contact the delinquent and the "employer" or "person who will always know" the delinquent's address, as shown on the Registration Card (SSS Form No. 1), or any other person likely to know his whereabouts. The local board may enlist the aid of local and State police officials or any other public or private agencies it deems advisable. In no event shall the local board order or participate in the arrest of a delinquent.

(c) Whenever the local board suspects a person, other than one of its own registrants, of being a delinquent, it shall, upon its own motion or upon request of the United States Attorney, advise such person by letter that he is suspected of being a delinquent and directing him to submit to the local board evidence concerning his selective service status. It shall be the duty of the person to whom such a letter is mailed to present such evidence to the local board and, if directed to do so, to appear personally before the local board. Unless the local board is convinced that such person is not delinquent, it shall report the facts to the United States Attorney by letter.

[E.O. 10001, 13 F.R. 5488, Sept. 21, 1948, as amended by E. O. 10258, 16 F. R. 6246, June 28, 1951. Redesignated at 14 F.R. 5021, Aug. 13, 1949]

§ 1642.42 *Local board action subsequent to reporting a delinquent to United States Attorney.*

(a) After a delinquent has been reported to the United States Attorney, it is the responsibility of the United States Attorney to determine, subject to the supervision and direction of the Attorney General, whether the delinquent shall be prosecuted. Before permitting a delinquent who has been reported to the United States Attorney on Delinquent Registrant Report (SSS Form No. 301) to be inducted, the local board should obtain the views of the United States Attorney concerning such action.

(b) After a delinquent has been reported to the United States Attorney on Delinquent Registrant Report (SSS Form No. 301) the local board shall promptly advise the United States Attorney by letter when:

(1) The local board receives any additional information which (i) may be of assistance in locating the delinquent, (ii) has been requested by the United States Attorney, or (iii) may assist the United States Attorney in determining whether prosecution is warranted; or

(2) The local board has taken any action with reference to the classification or status of the registrant.
[E. O. 10116, 15 F. R. 1330, Mar. 11, 1950]

§ 1642.43 *United States Attorney to advise final disposition.*

The State Director of Selective Service shall request the United States Attorney to advise the local board concerned promptly by letter when he finally disposes of a case which has been reported to him on Delinquent Registrant Report (SSS Form No. 301).

[E.O. 10001, 13 F.R. 5488, Sept. 21, 1948. Redesignated at 14 F.B. 5021, Aug. 13, 1949]

§ 1642.44 *Local board record of delinquents.*

(a) The local board shall open and maintain a Record of Delinquents (SSS Form No. 302), listing thereon all currently delinquent registrants including both those who have been reported and those who have not been reported to the United States Attorney on Delinquent Registrant Report (SSS Form No. 301). A person suspected of being an unregistered delinquent shall not be entered upon such report unless and until his registration has been accomplished. On the last day of March, June, September, and December the local board shall forward one copy of the Record of Delinquents (SSS Form No. 302) to the State Director of Selective Service having jurisdiction over the area in which such local board is located.

(b) On the last day of March, June, September, and December the local board shall post a copy of the current Record of Delinquents (SSS Form No. 302) on its bulletin board. The aid of the press and radio should be solicited to give the widest possible publicity to delinquencies.

[E.O. 10258, 16 F.R. 6246, June 28, 1951]

§ 1642.46 *State record of delinquents.*

The State Director of Selective Service shall prepare a Summary of Delinquencies (SSS Form No. 303) on or before the 15th day of January, April, July, and October and forward one copy to the Director of Selective Service, Washington, D.C.

[E.O. 10258, 16 F.R. 6246, June 28, 1951]

APPENDIX B.

Letter of October 26, 1967, From General Lewis B. Hershey, Director of the Selective Service System.

The basic purpose and the objective of the Selective Service system is the survival of the United States. The principal means used to that end is the military obligation placed by law upon all males of specified age groups. The complexities of the means of assuring survival are recognized by the broad authority for deferment from military service in the national health, safety, or interest.

Important facts, too often forgotten or ignored, are that the military obligation for liable age groups is universal and that deferments are given only when they serve the national interest. It is obvious that any action that violates the military selective service act or the regulations, or the related processes cannot be in the national interest.

It follows that those who violate them should be denied deferment in the national interest. It also follows that illegal activity which interferes with recruiting or causes refusal of duty in the military or naval forces could not by any stretch of the imagination be construed as being in support of the national interest.

The Selective Service system has always recognized that it was created to provide registrants for the armed forces, rather than to secure their punishment for disobedience of the act and regulations. There occasionally will be registrants, however, who will refuse to comply with their legal responsibilities, or who will fail to report as or-

dered, or refuse to be inducted. For these registrants, prosecution in the courts of the United States must follow with promptness and effectness. All members of the Selective Service system must give every possible assistance to every law enforcement agency and especially to United States attorneys.

It is to be hoped that misguided registrants will recognize the long-range significance of accepting their obligations now, rather than hereafter regretting their actions performed under unfortunate influences of misdirected emotions, or possibly honest but wholly illegal advice, or even completely vicious efforts to cripple, if not to destroy, the unity vital to the existence of a nation and the preservation of the liberties of each of our citizens.

Demonstrations, when they become illegal, have produced and will continue to produce much evidence that relates to the basis for classification and, in some instances, even to violation of the act and regulations. Any material of this nature received in national headquarters or any other segment of the system should be sent to state directors for forwarding to appropriate local boards for their consideration.

A local board, upon receipt of this information, may reopen the classification of the registrant, classify him anew, and if evidence of violation of the act and regulations is established, also to declare the registrant to be a delinquent and to process him accordingly. This should include all registrants with remaining liability up to 35 years of age.

If the United States Attorney should desire to prosecute before the local board has ordered the registrant for induction, full cooperation will be given him and developments in the case should be reported to the state director and by him to national headquarters.

Evidence received from any source indicating efforts by nonregistrants to prevent induction or in any way interfere illegally with the operation of the Military Selective Service Act or with recruiting or its related processes, will be reported in as great detail as facts are available to state headquarters and national headquarters so that they may be made available to United States attorneys.

Registrants presently in classes IV-F or I-Y who have already been reported for delinquency, if they are found still to be delinquent, should again be ordered to report for physical examination to ascertain whether they may be acceptable in the light of current circumstances.

All elements of the Selective Service system are urged to expedite responsive classification and the processing of delinquents to the greater possible extent consistent with sound procedure.

Local Board Memorandum No. 85, Issued by General Lewis B. Hershey on October 24, 1967.

Subject: Disposition of Abandoned or Mutilated Registration Certificate and Notices of Classification.

1. Whenever an abandoned or mutilated registration certificate or current notice of classification reaches a local board, and the card was originally

issued to a registrant by some other board, it should be forwarded to the state director of selective service, who will forward it to the appropriate local board if within the state, or the appropriate state director if the board of origin is outside the state.

2. Whenever a local board receives an abandoned or mutilated registration certificate or current notice of classification which had been issued to one of its own registrants, the following action is recommended:

(A) Declare the registrant to be delinquent for failure to have the card in his possession.

(B) Reclassify the registrant into a class available for service as a delinquent.

(C) At the expiration of the time for taking an appeal, if no appeal has been taken, and the delinquency has not been removed, order the registrant to report for induction or for civilian work in lieu of induction if in Class I-O, as a delinquent, or in the board's discretion in a flagrant case, report him to the United States attorney for prosecution.

(D) If appeal is taken and the registrant is retained in a class available for service by the appeal board, and the delinquency has not been removed, order the registrant to report for induction or for civilian work in lieu of induction if in Class I-O, as a delinquent, or in the board's discretion in a flagrant case, report him to the United States Attorney for prosecution.



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IN THE
Supreme Court of the United States

OCTOBER TERM, 1969

No. 71

DAVID EARL GUTKNECHT,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

**BRIEF OF CENTRAL COMMITTEE FOR CONSCIENTIOUS
OBJECTORS, AMICUS CURIAE**

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**BRIEF OF CENTRAL COMMITTEE FOR CONSCIENTIOUS
OBJECTORS, AMICUS CURIAE**

Interest of Amicus*

The Central Committee for Conscientious Objectors (CCCO) is a non-profit service organization founded in 1948 to assist persons who find themselves facing conflict with the power of the State as a result of conscientious objection to participation in war. In 1968, the Committee counseled over 10,000 young men with problems relating to compulsory military service. The Committee's counseling services are national in scope; CCCO has, aside from its headquarters in Philadelphia, regional offices in San Francisco and Chicago. In addition, CCCO has cooperating counselors and cooperating attorneys in every state and is widely recognized as one of the most expert and experi-

* Written consents by the attorneys for both parties have been filed with the Clerk.

enced draft counseling agencies. Of the registrants counseled by CCCO in 1968, the majority were considering or seeking conscientious objector status or student, medical, hardship or other deferments:

Amicus charges no fees for its services to registrants, attorneys, or any other persons. The views of amicus on various questions relevant to its expertise have, from time to time, been solicited by officials of the Selective Service System and by members of Congress.

Amicus also counsels those who for conscientious reasons cannot obey the draft law. Most of these men are among those who express publicly, in both traditional and unorthodox ways, their opposition to their government's involvement in the Vietnam war. CCCO, thus, has a direct interest in preserving the rights of persons who speak and act in peaceful protest, frequently religiously motivated, against war in general, or the current war in which our nation is involved.

ARGUMENT

Introductory Statement

The facts of this case, and particularly the action of petitioner's local board in declaring him delinquent because of a peaceful expression of protest, and immediately thereafter ordering him to report for induction, demonstrate the accuracy of General Hershey's description of the Selective Service statutes:

"You can do almost anything under this law, which is more than you can say for a great many laws that are on the books."

Review of the Administration and Operation of the Selective Service System, Hearings before the House Committee on Armed Services, 89th Cong., 2d Sess. 9698 (1966) (hereinafter cited as *First House Hearings*).¹ Pursuant to this

¹ General Hershey was arguing against any substantial revisions of the Universal Military Training and Service Act of 1951. Con-

pervasive, open-ended law, petitioner was the object and subject of flagrantly arbitrary and unlawful Selective Service action. His local board attempted to deprive him of his liberty and property and, in effect, threatened his life, without affording him even elementary rudiments of due process as are otherwise alleged available to Selective Service registrants.

No one denies that the public interest sometimes requires that the liberty of an individual be curtailed. Government has an abundance of power with which to deprive individuals of their liberty. But it is only the carefully evolved standards of procedure which we insist must attend every such deprivation which legitimate that power. As Mr. Justice Frankfurter has said: "The history of American freedom is, in no small measure, the history of procedure." *Malinski v. New York*, 324 U. S. 401, 414 (1945) (separate opinion).

Some of the constitutional guarantees which must precede any sacrifice of an individual's liberty to a perceived public good are before this Court in this case. These guarantees are as fragile as they are crucial to freedom. They must be protected from all attempted abridgement under any disguise.

Petitioner was ordered to leave his home and friends before the time appointed by statute. He was ordered to lose his liberty and to risk his life without the benefit of the elementary constitutional safeguards guaranteed to Americans. Any suggestion that what was at stake before petitioner's local board was not such a deprivation must struggle against common sense and the sentiments and understanding of petitioner and all other Americans subject to the draft. The essence of this case is that petitioner was threatened with a two-year loss of liberty (and perhaps a loss of life) for an alleged violation of a criminal statute

gress evidently was most responsive. See Military Selective Service Act of 1967, *passim*.

but without the benefits of a criminal trial. Moreover, petitioner was denied even those few rights of procedural due process which are generally available to Selective Service registrants before their status can be adversely affected.

A. The Declaration of Delinquency and the Resultant Order to Report for Priority Induction Constitutes a Substantial Deprivation of Liberty, Property, and Possibly Life, and as Such Violates Constitutional Guarantees of Due Process.

There is considerable evidence available which suggests that a local board's declaration of delinquency and the resultant induction order is a recognized deprivation of liberty. One need only look to official pronouncements of Selective Service, court decisions, the Report of the Civilian Advisory Panel on Military Manpower Procurement, and statements of the Solicitor General.

In a publication prepared by the Selective Service System, *Legal Aspects of Selective Service*, which was revised and updated in 1969 and which is the official Selective Service handbook for United States Attorneys, at page 47 it is pointed out that the Selective Service System and the Department of Justice have agreed not to prosecute under §12(a) of the Act those registrants who turn in draft cards (as contrasted to those who burn cards), but rather to have these registrants "processed administratively" by their local boards. The euphemism "processed administratively" obviously means that such registrants are to be declared delinquent, processed for immediate induction, and then prosecuted for induction refusal rather than for draft card non-possession. Since a prosecution for non-possession could lead to a deprivation of liberty, and since a local board "administrative process" also leads to a similar deprivation, this is a tacit acknowledgment that the delinquency process is punitive in operation.

This kind of government decision—that certain alleged violations of the Selective Service regulations should be "processed administratively" through delinquency declara-

tions—was one of the bases for the Second Circuit decision in *Wolff v. Selective Service Local Bd. No. 16*, 372 F. 2d 817 (2d Cir. 1967). That Court held the two local board respondents acted “without jurisdiction”, when they declared registrants delinquent for participating in a demonstration at the office of the Local Board. The Court emphatically pointed out that “jurisdiction over offenses of this character is exclusively granted to District Courts” by virtue of Section 12 of the draft act wherein it is made a federal criminal offense to knowingly hinder or interfere in any way with the act. *Id.* at 821-822.

Similarly, the petitioner committed an alleged violation of Section 12 which provides in part that it is a federal criminal offense to violate any of the rules or regulations relating to possession of Selective Service certificates. And, like *Wolff*, petitioner was declared delinquent and punished because of his involvement with protest activity. This Court should approve the Second Circuit's holding “that it is not the function of local boards in the Selective Service System to punish these registrants” *Id.* at 822. Cf. *Oestereich v. Selective Service System*, 393 U. S. 233 (1968); *Clark v. Gabriel*, 393 U. S. 256 (1968); *National Student Association, Inc. v. Hershey*, 37 U. S. L. W. 2689, 2 SSLR 3030 (D. C. Cir. June 6, 1969); *United States v. Eisdorfer*, 37 U. S. L. W. 2621, 1 SSLR 3115, 2 SSLR 3002 (E. D. N. Y. April 16, 1969).

Further indications of Selective Service's view that delinquency is retributive is evidenced by its Delinquency Notice (SSS Form No. 304) which reads as follows (after setting forth information about the registrant):

“1. You are hereby notified that this Local Board has declared you to be delinquent because of your failure to perform the following duty or duties required of you under the selective service law:

“2. You are hereby directed to report to this Local Board immediately in person or by mail, or to take

this notice to the Local Board nearest you for advice as to what you should do.

"3. Your willful failure to perform the foregoing duty or duties is a violation of the Universal Military Training and Service Act [sic], as amended, which is punishable by imprisonment for as much as 5 years or a fine of as much as \$10,000. Or by both such fine and imprisonment. You may be classified in class I-A as a delinquent and ordered to report for induction."

The language on this form conveys only one impression—that the delinquent registrant has committed a grievous wrong and must answer for such by submitting to induction or by acquiescing in the board's judgment as to how, if at all, such declaration can be cured.

The punitive nature of delinquency was conceded by the Solicitor General in this Court. See brief for United States, p. 49, *Oestereich v. Selective Service System*, 393 U. S. 233 (1968). And the 1967 Clark Commission, in its report to the House Committee on Armed Services, expressed its belief that delinquent registrants *should* be deprived of their liberty:

"The Panel noted with dismay the number of disloyal acts of alleged burning of draft cards or registration certificates, and that there have been reported far more incidents of burning of cards than there have been prosecutions under the law. The Panel, therefore, urged that those who destroy draft cards or certificates be *severely and expeditiously punished* under authority of existing law."

Civilian Advisory Panel on Military Manpower Procurement, Report to the Committee on Armed Services, House of Representatives, 90th Cong., 1st Sess., Feb. 28, 1967 (emphasis added).²

² The existing law at the time of this recommendation included, in addition to a specific penal provision for draft card burning,

It is incontestable that conscription, whether in time of war or peace, is *always* a severe deprivation of liberty, property and possibly life.³ This proposition has been acknowledged, explicitly or implicitly, by the Congress, individual Senators and Congressmen, the federal courts—including this Court, and by the results of public opinion polls.

This Court in 1923 in *Meyer v. Nebraska*, 262 U. S. 390, 399-400, pointed out that the liberties guaranteed by the due process clause include freedom from bodily restraint, freedom to contract for work, to engage in common occupations of life, and to marry and live with one's wife and children. See *Truax v. Raich*, 239 U. S. 33 (1915). It is self-evident that compulsory military service imposes a substantial abridgement of these liberties. It likewise restricts freedom of speech and association [see *Shelton v. Tucker*, 364 U. S. 479 (1960)], inasmuch as servicemen do not have the same degree of freedom of speech and association as civilians. *United States v. Howe*, 17 U. S. C. M. A. 165 (1967); Kester, *Soldiers Who Insult the President*, 81 Harv. L. Rev. 1697 (1968).

In addition, the individual is subject to military commands and law which impose a more restricted standard of behavior than that available to civilians. See *Uniform Code of Military Justice*, *passim*, 10 U. S. C., §§801, et seq. The very existence of the federal habeas corpus writ for servicemen is testimony that continued retention in the military in certain circumstances is a deprivation of liberty. See *Jones v. Cunningham*, 371 U. S. 236 (1963).

The Congress, also, in its declaration of policy as enunciated in the first section of the Military Selective Service Act of 1967, acknowledged that compulsory service is a

all of the present delinquency regulations, and all of those involved in this case.

³ Although the deprivations are self-evident, constitutional legitimacy depends, of course, on whether they are pursuant to due process of law.

deprivation when it referred to the "obligations and privileges" of service.⁴

Conscription also can exact the maximum price. Given the fact that capital punishment has not been visited upon a convicted felon for over a year and a half, selective service is the only government institution with the power to, in effect, order a man to possible death. Comment, *The Selective Service*, 76 Yale L. J. 160 (1966); Note, *New Draft Law: Its Failures and Future*, 19 Case W. Res. L. Rev. 292 (1968). See remarks of Senator Edward Kennedy, 114 Cong. Rec. S. 1801 (Feb. 28, 1968). And if there is a more egregious deprivation than death, it may be requiring an individual to become a killer of others—the ultimate deprivation imposed by the draft.⁵

It cannot be maintained that military service is solely an attractive privilege because many young men enlist or volunteer for induction. Undoubtedly, there are a certain number of truly voluntary enlistments. But, in 1966, "(o)f the 1,090,000 men (excluding officers) who entered service in that year, 343,500 were inducted. Another 380,700 entrants enlisted *after* they were given pre-induction examinations and were found qualified. A total of two-thirds of entrants into military service, thus, were attributable to

⁴ That induction into the armed services is likewise a deprivation of property is borne out by an examination of any newspaper classified section wherein registrants about to be inducted are frantically offering to sell their automobiles and other personal possessions. At the time Gutknecht failed to submit to induction, the basic pay for an army private was \$96 per month. In peacetime, it is a substantial question whether the state may raise armies by a system of in kind taxation on the services of young men which admittedly falls on only a percentage of even those fit for military service [see, e.g., Report of the National Advisory Commission on Selective Service, *In Pursuit of Equity: Who Serves When Not All Serve?*, pp. 17-29, 57-59 (1967)] rather than by financial taxation of the nation as a whole to pay the actual economic value of the services of our military men.

⁵ "In general, a democratic government may be entitled to obedience, but there are limits to its justifiable demands on citizens. If it orders citizens to kill or die, it comes close to the limits that even Hobbes put down around the authority of the Leviathan." Christian Bay, quoted by Prof. Arnold Kaufman in Finn (ed.), *A Conflict of Loyalties* 252 (1968).

Selective Service in one of these direct ways. There is no way of knowing how many of the remaining 366,000 'volunteer' enlistments were draft-inspired to some extent. Confirmation of the importance of the draft to enlistments, if any is needed, may be found in 1964 Defense Department Opinion Studies of Service Personnel Who Have Enlisted. Even in this 'peacetime' army, more than 43% of the army respondents said that their enlistments were 'draft-inspired'." Davis and Dolbare, *Little Groups of Neighbors: The Selective Service System* 13 (1968), quoting from *Annual Report of the Director of Selective Service for Fiscal Year 1966*, 43 (1967). See, also, statements of General Hershey, *First House Hearings* 9625-9626; *Army Reports Enlistments Fell 9,000 Short of Its Objective in the Last Year*, *New York Times*, July 24, 1969, at 9, col. 1.

The April 11, 1966, issue of *Newsweek* reported that for the first time in history, while America was at war, avoidance of military service had become socially acceptable; and *Time* reported on June 3, 1966: "Still, draft ducking—or talking about draft-ducking—has become a favorite extracurricular pursuit of the Class of '66. Potential inductees kick around notions of claiming to be afflicted with everything from chronic bed-wetting to bad eyes, from homosexuality to bad backs"

A similar observation was related by Kingman Brewster, the President of Yale University and a member of the National Advisory Committee on Selective Service, in an address to the 1966 Yale graduating class. "Selective Service, in order to staff a two million man force from a two hundred million population has invented a cops and robbers view of national obligation. National morality has been left exposed to collective self-corruption by the persistent refusal of the national administration to take the lead in the design of a national manpower policy which would rationally relate individual privileges and national duty." Marmion, *Selective Service: Conflict and Compromise* 19 (1968).

An unending flow of national opinion polls and reports from college campuses demonstrates beyond any rational doubt that for the great majority of draft age men the anticipation of compulsory military service is by no means regarded as a "privilege". See, e.g., "Seventy-eight percent of persons on a national cross section who were asked by the Louis Harris Poll about the extent of draft evasion said that some or a lot of young men engaged in the practice. . . ." New York Times, June 20, 1967, at 2, col. 4. *22% Prefer Jail or Exile to Draft in the Harvard Poll*, New York Times, January 15, 1968, at 5, col. 1. *Poll of Columbia Seniors Finds 79% Oppose Draft*, New York Times, February 27, 1968, at 8, col. 3. *Teachers Ranks Swollen by Men Avoiding Draft*, New York Times, Jan. 7, 1969, at 63, col. 5. "Seventy percent of the Brandeis University senior males say they will try to avoid induction into the armed services." New York Times, March 28, 1968, at 66, col. 7.

Amicus is not here contending that the fact that conscription is regarded by both its enforcers and those upon whom it is enforced as a burden rather than a benefit, an obligation rather than a privilege, a deprivation of liberty rather than a sharing of responsibility, conclusively demonstrates that the entire institution is unconstitutional. But amicus vigorously urges that the "privilege" notion is conceptual nonsense which has no relevance to reality. At issue in this case is not the power to draft, but the power to selectively and without due process pluck a dissenter out of the general draft-eligible population and order him inducted ahead of his time, and ahead of all others similarly situated.

B. *The Arbitrary Manner in Which a Local Board Can Exercise Its Considerable Discretion to Declare a Registrant Delinquent Demonstrates That Delinquency Is a Serious Deprivation of Liberty, Property and Possibly Life.*

The decision to declare petitioner delinquent and subject him to priority induction without any rights of appeal and

without any of the requisite elements of due process rests wholly within the discretion of the local board. The important Selective Service delinquency regulation is 32 C. F. R. 1642.4(a) wherein a delinquent act is defined: "Whenever a registrant has failed to perform any duty or duties required of him under the Selective Service law other than the duty to comply with an Order to Report for Induction (SSS Form No. 252) or the duty to comply with an Order to Report for Civilian Work and Statement of Employer (SSS Form No. 153), the local board may declare him to be a delinquent."

A second definition of delinquent, one based on an intensive study of local board practices, is offered by the Marshall Commission: "A delinquent is any registrant who, in the *opinion of a local board*, has failed to meet the requirements of the Selective Service law." National Advisory Commission on Selective Service, *In Pursuit of Equity: Who Serves When Not All Serve?* 19 (1967) (emphasis added) (hereinafter cited as *Marshall Commission*). The Marshall Commission had other comments about the wide discretion Selective Service gives to local boards. "But because the System offers wide latitude for critical judgment by the boards themselves, this profusion of guidance (e.g., regulations, operations bulletins, local board memoranda, etc.) does not always articulate a clearly defined policy to the board. Moreover, boards across the country receive varying amounts of, and sometimes directly conflicting, guidance on the same subject." *Id.* at 27.*

Of course, the Selective Service System itself, freely admits to the discretion given its local boards. As General Hershey, National Director of Selective Service, stated before the House Committee on Armed Services considering the proposed 1967 Draft Act:

* The Marshall Commission found so much fault with the conferring of broad unchecked discretion on local boards that this dissatisfaction was reflected in its first recommendation which was to make the controlling concept of Selective Service the "rule of law, rather than a policy of discretion." *Id.* at 4.

"Uncertainty is the thing that keep us alive and keeps us active and keeps us thinking. As soon as you get a person with complete security and complete certainty, when he has no uncertainties of any kind, you have got a fellow, you might as well bury because there is nothing more in the world that he can do."

Hershey statement, *First House Hearings*, at 9693.⁷

The above documentation which describes the wide discretion given local boards means, among other things, that these boards have considerable unchecked power, and concomitantly, for this and other reasons, the registrant is basically powerless. In the case at bar there was nothing in petitioner's Selective Service file to indicate how or under what circumstances his Minnesota Local Board No. 115 received any information concerning his draft card. See petitioner's Eighth Circuit brief at page 37. Thus, the delinquent registrant is particularly burdened because as this Court stated in *Miranda v. Arizona*, 384 U. S. 436, 448 (1966), "(p)rivacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on. . . ."

We are not without judicial precedent in asserting that the delinquency regulations unconstitutionally give our country's autonomous local boards tremendous powers and wide discretion. In *United States v. Eisdorfer*, — F. Supp. —, 37 U. S. L. W. 2621, 1 SSLR 3115, 2 SSLR 3002 (E. D. N. Y. April 16, 1969), Judge Dooling observed:

"There are no degrees of delinquency. No standards prescribe the particular occasions when the power is

⁷ The Selective Service System has further characterized its mode of carrying out its responsibilities: "The Selective Service law is deliberately designed to place responsibility for the mobilization of manpower in the local communities, with broad discretion given to members of the local boards." Selective Service System, *The Selective Service System: Its Concept, History, and Operation* 10 (1967).

to be exerted, or what findings of gravity, of willfulness, of penitence, of reparation are relevant to deciding whether or not to declare the registrant delinquent. It does not help that the regulations may not be insupportably vague in describing the duties imposed. The fault is in the absence of any standard or guide to the evaluation of the importance of the omitted duty and the guilt-character of the omission to perform it.

"If the declaration of delinquency were only a first stage to be followed by an ordered and sortable set of governmental responses, the arbitrariness of the regulations would be relieved; but the regulations contemplate only one kind of delinquency with one consequence for all cases in which the status is acted upon, and there is no alternative except complete remission, again by local board action taken at unbounded discretion." 1 SSLR at 3116.

In considering local board discretion, it is essential to bear in mind that national headquarters of Selective Service explicitly and implicitly encourages the 4,100 local boards to execute discretion in a manner which national headquarters believes will promote the National Director's concept of the "national interest." The chief vehicle for espousing the ethos of Selective Service is its monthly newsletter, *Selective Service*, which is mailed from Washington to every employee, local board member, and other participants. In each issue the National Director has a personally signed column. A random perusal of several issues would bear this fact out; a specific citation is enlightening. "It is a hope supported by some reasonable expectancy that the changing international situation will cause our public to demand more responsible conduct by our registrants and less liberality by our courts toward those failing to perform their obligations." Quoted in Davis and Dolbare, *Little Groups of Neighbors: The Selective Service System*, 45 (1968). This kind of language em-

ployed by General Hershey is an invitation to local boards to flex their muscles vis-a-vis the "irresponsible" registrant.⁸

In order to understand the *modus operandi* of a local board, and particularly the procedure employed when a local board is faced with a decision as to whether a registrant should be declared delinquent, it is essential to consider the effective power of the local board clerks, notwithstanding the absence of explicit or implicit statutory authority. See, e.g., 32 C. F. R. 1604.56; 1622.1(c); 1623.1(b); 1625.1(c); 1642.4(a). Congressman Chet Holifield, while participating in the hearings before the House Committee on Armed Services concerning the proposed 1967 draft law, commented:

"The Civil Service Commission clerks are running these boards, not the members. The members are men working without pay. They are doing a patriotic job . . . but the bulk of the work, I would say 85 percent of the work of screening and classifying these boys are done by civil service clerks, and then when the board meets that night, they hand it to them, and they run through them and the clerk says 'this bunch on the top ought to go,' so they sign their names and they go. In many instances we are not achieving the principle that we thought we were achieving of having local businessmen and leaders in the community express evaluative judgment on the merits of specific cases. It is being done by low-paygrade clerks." *First House Hearings*, 9764.

⁸ For an illustration of the apparently ubiquitous need to satisfy the Director of Selective Service, see Mitford, "Guilty as Charged by the Judge", *Atlantic*, Vol. 224, No. 2, 48, 52 (August 1969). The author reports that the Justice Department official in charge admitted that the prosecution in *United States v. Spock, et al.*, "came about as a result of our flap with Hershey about his October 26 letter to the draft boards. The prosecution of these five was thought to be a good way out—it was done to provide a graceful way out for Gen. Hershey."

The Clark Commission which gave a more favorable treatment to Selective Service than the Marshall Commission concurred with Congressman Holifield's observations regarding the immense power of local board clerks.⁹

Account must also be taken of the universal practice of local boards in spending an infinitesimal amount of time on the case of any specific registrant. Because local board members serve as an avocation and because their businesses consume their primary time, local boards unfortunately have little time for their uncompensated activities as board members. This fact has been documented by James Davis, Jr., and Kenneth Dolbare, both consultants to the Marshall Commission.

"In 1966 the average board in Wisconsin with from three to six thousand eligible age registrants and with three to four registrants appearing personally at each meeting, met once a month for three or four hours and handled 250 to 300 classifications per meeting."

Davis and Dolbare, *Little Groups of Neighbors: The Selective Service System* 79 (1968).¹⁰

⁹ "It is the clerks who marshal and assimilate all the information needed to support the proper classification of registrants. It was found that Local Boards depend almost wholly on them for a substantial percent of classification actions, i.e., those where classification is self-evident from a competent examination and assessment of the information contained in the files. The clerks are also relied on heavily for information on policy and regulations in those less evident classifications that require the application of the Board's experience, expertise, and judgment." *Report of the Task Force on the Structure of the Selective Service System*, VI-20 (1967).

¹⁰ The Marshall Commission also noted the brevity with which local boards treat registrants' claims: "The 'anonymity' of the boards is perhaps one reason for this impression (many young registrants who met with the Commission felt that the local board clerk had awesome powers at the expense of the board); even more likely however is the method of board operation. Many board members have heavy professional and business duties. They usually meet in the evening to make their classifications." *Marshall Commission* 21. See, also, *The Selective Service*, 76 Yale L. J. 160, 176 (1966); Ginger, Minimum Due Process Standards in Selective Service Cases, 19 Hastings L. J. 1313, 1324 (1968).

Another relevant factor which suggests that a local board's *modus operandi* in processing delinquent registrants is incongruous with notions of due process is the juxtaposition between the typical registrant and the typical local board member. The Marshall Commission's exhaustive survey and statistical analysis produced the following description of the average local board member—he is 58 years old, white, middle-class, and without legal training. *Marshall Commission* 19. The Commission also found that in 1966 95% of all local board members were 40 years old or older and that 45% of local board members were 60 years old or older. *Marshall Commission*, Appendix, Sec. 1, 73-74.

Thus, a registrant may be declared delinquent if he “fails or neglects to perform any duty required of him under the provisions of the selective service law” and this determination as to whether he violated the law will be made by a much older person, not his peer, who is without legal training. It is respectfully submitted that this unbounded discretion combined with the absence of any standards whatsoever and the actual practices of local boards, must result in a judicial determination of the unconstitutionality of the delinquency regulations.

C. The Punitive Nature of Delinquency Declaration and Priority Induction Is Further Aggravated by the Total Absence of Effective Judicial Review.

It is a truism of Selective Service law that the scope of judicial review of the classification decisions and induction orders of local boards is exceedingly narrow. See *Estep v. United States*, 327 U. S. 114 (1946); Military Selective Service Act of 1967, 50 U. S. C. A. App. §460 (b)(3); *United States v. Gearey*, 379 F. 2d 915 (2d Cir. 1967), cert. den. 389 U. S. 959. It has been somewhat imprecisely but most aptly described as judicial review which is the “narrowest known to the law”, *Robertson v. United States*, 404 F. 2d 1141, 1144 (5th Cir. 1968), a descrip-

tion which the Selective Service System heartily approves. See *Legal Aspects of Selective Service*, *supra*, at 52-3. That this narrow scope of judicial review has caused considerable injustice because courts have been left powerless to correct obviously unfair administrative action—in a large number of cases has been documented by many commentators. Comment, *Fairness and Due Process Under the Selective Service System*, 114 U. Pa. L. Rev. 1014, 1024, 1049 (1966); Comment, *The Selective Service System: An Administrative Obstacle Course*, 54 Calif. L. Rev. 2123, 2141 (1966); Note, *Changes in the Draft: The Military Selective Service Act of 1967*, 4 Colum. J. of L. and Soc. Prob. 120, 156-160 (1967). Amicus is convinced that sooner or later this Court will have to cope with the issue of the proper scope of judicial review in Selective Service cases. See 4 Davis, *Administrative Law*, §29.07, at 151-52 (1958); Jaffe, *Judicial Review: Question of Fact*, 69 Harv. L. Rev. 1020, 1050 (1956).

Presumably, one of the justifications for judicial toleration thus far of the narrow review of Selective Service actions is that the administrative procedure normally contemplates a certain amount of fact finding with some opportunities provided to the registrant to persuade the decision makers. See *Estep v. United States*, *supra*, at 116, 137; *Witmer v. United States*, 348 U. S. 375, 376-377 (1955). A further theoretical prop, for a system which provides some administrative review but very limited judicial review, is that the end result of the system is not considered a sanction in the customary sense.

Perhaps this is true with regard to the normal workings of Selective Service, in accordance with the established doctrine that an induction order is not punitive. But an induction order as a result of a declaration of delinquency is punitive and nothing but punitive. See *argument, supra*, pp. 4-10. Consequently, it is one thing to say that minimal judicial review is constitutionally tolerable where there is no punishment involved but only a fair selection process

which must be shared by all. It is completely different where what is involved is no longer a fair selection process, but the deliberate extraction of certain individuals, via the delinquency process, for priority induction.

Finally, in this particular case, the registrant has been removed even one dimension further from any semblance of due process. Because he was already classified I-A at the time of the delinquency declaration, he was denied by the Selective Service regulations even the minimal amount of due process which is customarily available when a registrant who has a classification other than I-A is declared delinquent, and is reclassified I-A. 32 C. F. R. §1642.14. This petitioner, therefore, has had no administrative due process and he has had no effective judicial review. The District Court in this case, feeling itself bound to follow the "basis in fact" test, rendered itself impotent from exercising any effective judicial function. It became, in fact, merely an instrument for certifying a felony conviction which had been previously imposed by the petitioner's local board without any due process at all.

This Court should decide, at the very least, that a broader standard of judicial review must be required in delinquency cases. Otherwise, the entire process is worthy of portrayal as a scene in the theatre of the absurd.

D. The Proper Role of Delinquency Proceedings.

Amicus urges that the holding of the Second Circuit in *Wolff v. Selective Service Local Bd. No. 16*, *supra*, should be adopted by this Court. It is not the function of the Selective Service System, via the institution of delinquency proceedings, to try and to punish registrants for alleged violations of the Selective Service laws. Nor is it the function of the Selective Service System to impose "civil sanctions" whether they be analogized to contempt, or otherwise. The Congress has not authorized, nor does it have the constitutional power to authorize, an administrative agency to assume the role of a judicial tribunal via

the invocation of the word "delinquency" or any other word magic.

Amicus urges that the only constitutionally tolerable function which delinquency proceedings can serve is as a formal means of warning a registrant that he is about to be reported to the United States Attorney for an alleged violation of Selective Service law, but that if he chooses he may, at his option, accept priority induction in lieu thereof. Since certain constitutional rights can presumably be knowingly waived, it would not be constitutionally improper for a registrant to choose to forego a criminal trial and to rather accept, at his own volition, the "civil penalty" of priority induction. But unless the choice is for the registrant to make, the entire process of delinquency can be, often is, and in this case certainly has been converted into a Star Chamber for the sending of a man to jail without any hearing at all.

CONCLUSION

Amicus respectfully reiterates that this case does not involve the question of whether the draft is or is not punishment. This case does not involve the question of the quantum of due process to which registrants are normally entitled in the Selective Service System. Nor does this case involve the question of the proper scope of judicial review of administrative action in the normal Selective Service case.

But regardless of whether or not the draft is punishment, it most assuredly is punishment to scoop up a political or religious dissenter, out of his normal turn, and send him off to war before all others. To be called in one's turn and to serve honorably may be both a privilege and an obligation. But to be branded a delinquent, particularly because of some act of dissent, and then with the brand emblazoned on oneself, to be immediately removed from civilian life

and placed under military command is nothing less than punishment. Various totalitarian and semi-totalitarian governments in different parts of the world have, from time to time, in fact utilized induction into the military as a means of punishing dissenters. It is reputed to be the normal course of events in certain Latin American dictatorships. But until the events which precipitated the decision of the Second Circuit in *Wolff v. Selective Service Local Bd. No. 16, supra*, and the aggravated repetition of these events which precipitated this case and the companion cases, punitive reclassification and priority induction had not been a feature of the American scene.

There are many things that can be criticized about American society. Throughout our history dissenters have been deprived of their liberty in a myriad number of ways. But the recent epidemics of punitive reclassifications and priority inductions represent the first occasion when the drafting power has been used as an instrument for punishing dissenters.

Amicus respectfully prays that in its decision in this case, this Court should reach the merits of the underlying issues and should declare the entire reprehensible practice to be in violation of constitutional guarantees.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 71

DAVID EARL GUTKNECHT, PETITIONER

v.

UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT*

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (A. 33-38)¹ is reported at 406 F. 2d 494. The memorandum opinion and findings of fact of the district court (containing the verdict in the jury-waived trial) (A. 24-32) are reported at 283 F. Supp. 945. The memorandum opinion of the district court denying petitioner's pre-trial motion to quash the indictment because of duplicity (A. 4-6) is unreported.

¹ "A." refers to the printed joint appendix; "R.", to the clerk's record; "Tr.", to the trial transcript; and "G. Ex. 1," to Government Exhibit 1, consisting of petitioner's Selective Service file, sometimes called his "cover sheet." The "Item" numbers following "G. Ex. 1" references refer to the figures in the upper right-hand corners of the documents contained in that exhibit.

JURISDICTION

The judgment of the court of appeals was entered on January 20, 1969. On February 11, 1969, Mr. Justice White extended the time for filing a petition for certiorari until March 21, 1969, and the petition was filed on March 19, 1969. The petition was granted on April 28, 1969 (394 U.S. 997). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the particular circumstances of this case, and in light of the specific findings of the district court, petitioner, a Selective Service registrant already classified I-A, was properly declared to be a delinquent and ordered to report for priority induction into the Armed Forces.

2. Alternatively (in the event that the Court should determine that accelerating the induction of a delinquent registrant already classified I-A is indistinguishable in principle from delinquency reclassification to I-A coupled with accelerated induction), whether the provisions of the Selective Service regulations authorizing the reclassification to I-A and the accelerated induction of delinquents (defined as registrants who have failed to comply with duties imposed on them by the Selective Service Act or regulations) are (a) authorized by the Act, (b) consistent with constitutional safeguards against the imposition of punishment without following prescribed procedures, (c) otherwise consonant with procedural due process, (d) sufficiently definite to provide guidelines to local boards regarding the manner of their enforcement, and

(e) as applied to the duty of registrants to maintain their draft cards in their possession at all times, compatible with First Amendment liberties.

3. Whether the order directing petitioner to report for accelerated induction as a delinquent was authorized by the regulations themselves.

4. Whether the government adequately established that petitioner in fact willfully failed to submit to induction, although there was no showing that he was given an opportunity to take the traditional "one step forward" at the induction center.

5. Whether the one-count indictment, charging that petitioner failed to comply with an order of his local board directing him to report for and submit to induction, was duplicitous and thus defective.

STATUTE AND REGULATIONS INVOLVED

Pertinent provisions of the Military Selective Service Act and the Selective Service regulations involved are set forth in Appendix A to petitioner's brief (pp. 1-17); additional relevant provisions are contained in Appendix A hereto, *infra*, pp. 75-78.

STATEMENT

Following a non-jury trial in the United States District Court for the District of Minnesota, petitioner was convicted of willfully failing to comply with an order of his local Selective Service board directing him to report for and submit to induction into the Armed Forces of the United States, in violation of 50 U.S.C. App. 462 (A. 2, 24-32). On July 15, 1968, he was sentenced to four years' imprisonment, the judgment providing, pursuant to 18 U.S.C. 4208(a)

(2), that he would be eligible for parole at such time as the Board of Parole should deem appropriate (R. 14). The court of appeals affirmed (A. 33-38).

Petitioner, now 21 years of age, registered with the Selective Service System at Local Board No. 115, Gaylord, Minnesota, on December 20, 1965, shortly after his eighteenth birthday (A. 24, 40; Pet. Br. 3). Following a brief period during which he was classified I-A, he was, on March 15, 1966, reclassified II-S by reason of his status at that time as a college student. He retained that classification until June 21, 1967, when he was again classified I-A pursuant to his notification to his local board that he was no longer a student (A. 25; Pet. Br. 3). Contending that he was entitled to a I-O classification as a conscientious objector (he had submitted a request for that status some months previously), petitioner appealed from the I-A classification to the State Appeal Board (A. 25; G. Ex. 1, Item 15). On October 16, 1967, while that appeal was pending, petitioner participated in a "Stop the Draft Week" demonstration at the federal building in Minneapolis. During the demonstration he attempted to turn over his Selective Service registration and classification certificates to a deputy United States marshal. When the deputy marshal refused to accept the documents, petitioner dropped them at the officer's feet, together with mimeographed literature giving reasons for his actions (A. 30, 42).

On November 1, 1967, petitioner's request for conscientious objector status was denied by the State Appeal Board and he was classified I-A by that body.

Petitioner was duly notified of this action on November 27, 1967 (A. 25; G. Ex. 1, Items 1 (p. 8) and 22).

On December 20, 1967, petitioner was declared a delinquent by his local board for failing to retain his registration and classification cards in his possession at all times, as required by the Selective Service regulations (32 C.F.R. 1617.1, 1623.5) (A. 25). On the following day, December 21, a delinquency notice (SSS Form No. 304) so advising petitioner was mailed to him (A. 25, 44). The delinquency notice informed him that "[v]alid evidence" had been submitted to the board that petitioner had not at all times had and did not then have in his possession the registration and classification cards which had been issued to him by the board; advised him that he had been declared delinquent on the basis of that evidence; directed him to report immediately to his local board in person or by mail, or to take the notice to the board nearest him for advice as to what he should do; warned that his willful failure to perform the duties referred to was a violation of the Act punishable by imprisonment for as long as five years or a fine of as much as \$10,000, or both; and advised that in consequence of the declaration he might be "classified in class I-A as a delinquent and ordered to report for induction" (A. 44). Petitioner took no action in response to the delinquency notice. The local board, on December 26, 1967, ordered him to report for induction as a delinquent on January 24, 1968 (A. 25).

Pursuant to the order, petitioner reported to the board's Gaylord office on the designated date and from

there, together with other reporting registrants, proceeded by bus to the Armed Forces induction center in Minneapolis (A. 10-11, 25). At the induction station petitioner informed Sergeant Billy O'Neil, the non-commissioned officer in charge of the processing section, that he had no intention to "process in any way, such as physical examination or mental" (A. 11-12, 25). The sergeant thereupon escorted petitioner to the office of Lieutenant Larry Petrie, the Assistant Processing Officer, and petitioner similarly advised that officer that he "was refusing to cooperate with the Selective Service System by taking tests, physical and mental, for the draft" (A. 12, 21, 25). Lieutenant Petrie warned petitioner that under the law refusal to submit to processing for induction was a felony punishable by up to five years' imprisonment or a \$10,000 fine or both (A. 13, 21, 25-26). Petitioner said he was aware of the penalty and presented to the officer a prepared typewritten statement declaring that he was "refusing to be inducted into the United States armed forces" and stating his reasons for so doing (A. 26, n. 1). That statement said, in substance, that petitioner regarded the Selective Service System and the Vietnam conflict as "indefensible" and viewed the draft laws as "not worthy of obedience" (A. 26, n. 1). In the presence of the officer petitioner wrote on the typed statement, "I refuse to take part, or all [*sic*], of the prescribed processing," and signed his name (A. 13-14, 21, 26-47).

At the trial petitioner introduced into evidence copies of a memorandum dated October 24, 1967, and of a letter dated October 26, 1967, each from the Na-

tional Director of the Selective Service System, General Lewis B. Hershey, to local boards throughout the country (D. Exs. B and C, Tr. 105).² In the memorandum the Director recommended that whenever a board receives an abandoned or mutilated registration certificate or classification notice which was issued to one of its registrants the registrant should be declared delinquent for failure to have the card or cards in his possession and should be processed pursuant to the delinquency regulations. In the letter the Director noted that deferments are given only when they serve the national interest; that any action which violates the Selective Service Act, the regulations thereunder, or "related processes" are not in the national interest; and that those who commit such violations should consequently be denied deferment in the national interest. "Demonstrations, when they become illegal," the letter said, had produced much evidence that "relates to the basis for classification and, in some instances, even to violation of the act and regulations." The letter further stated that any material of this nature should be sent to local boards for their consideration and action, which in appropriate instances, if violation of the Act or regulations were established, might include declaring a registrant a delinquent and processing him accordingly.

The district court noted in its findings that reference had been made at the trial to "a certain Local Board memorandum" in which the Selective Service

² See Pet. Br. App. 18-21, where both documents are reprinted.

Director had "recommend[ed] procedures to be followed by local Selective Service Boards in the cases of registrants participating in anti-Vietnam demonstrations," but observed that the evidence clearly showed that petitioner had been declared delinquent and ordered to report for induction, "not by authority of the so-called Hershey memorandum," but because of his non-possession of his draft cards, in violation of the regulations (A. 31).³ The district court further found that "[t]here is nothing in the Selective Service file or in any of the evidence received at trial to support the assertion that [petitioner's] classification as a delinquent and order to report for induction were based on his expressions of opposition to the Vietnam war" (A. 30).⁴

In affirming petitioner's conviction, the court of appeals initially rejected his claims that he was erroneously "not afforded the opportunity to go through the regular formal induction ceremony" and that the indictment was duplicitous in charging him with both

³ Although the court referred in this connection to the Director's "memorandum", it appears that it was referring to the Director's letter, since only the letter referred to the participation by registrants in "demonstrations". Alternatively, the court may have intended to refer to the memorandum and letter collectively.

⁴ The district court also rejected petitioner's claim that the procedures followed at the induction center were fatally defective because he was not given an opportunity to take the traditional "one step forward" signifying submission to induction. It noted that an order to report for induction "also encompasses an order to *submit* to induction," and that petitioner, by "refus[ing] to take the physical or mental tests or participate in any other procedure incident to induction," had made it clear beyond any doubt that he refused to submit thereto (A. 27-30). In an earlier opinion the court had found that there was no duplicity in the indictment (A. 4-6).

failure to report for and failure to submit to induction, relying on this Court's decision in *Billings v. Truesdell*, 321 U.S. 542, 557, and the district court's opinion on these points (A. 34-35). As to petitioner's claim that his accelerated induction as a delinquent was punitive, the court below noted that the district court "found that there was no evidence at the trial to support [petitioner's] contention that his delinquency order was based upon his political views," but rather that it stemmed from his violation of the possession regulations (A. 35). In distinguishing this Court's decision in *Oestereich v. Selective Service Bd.*, 393 U.S. 233, the court remarked that "the order of delinquency [here] did not relate to a reclassification" at all, unlike the situation there where the registrant had been entitled to a statutory exemption. Petitioner was already classified I-A and did not challenge the propriety of that classification, the court noted. While stating that "[a]dmittedly [petitioner's] induction date was advanced," the court indicated that that was done pursuant to 50 U.S.C. App. 456(h)(1), as amended in 1967, "which gives priority of induction to 'delinquents'" (A. 36).

The court below further noted that the order of induction of those classified I-A is otherwise established by regulation (32 C.F.R. 1631.7), and that since the priorities established by that regulation are "administratively created" there is "no legal reason why the order of call cannot be administratively altered as long as it is done 'impartially' without discrimination" (A. 36). Emphasizing that it was "not confronted here with a reclassification which has no

basis in fact or which attempts to deprive the defendant of any existing statutory exemption or deferment," the court concluded that the definition of "delinquency" contained in the regulations "is not unreasonable when its effect does not otherwise punish an individual by depriving him of a right given him by statute" (A. 36-37).

SUMMARY OF ARGUMENT

I

Because petitioner was already classified I-A when he was declared delinquent, only the validity of the delinquency regulations in causing accelerated induction is necessarily involved here. Petitioner is not a registrant who lost a deferred or exempt status to which he was otherwise entitled as a result of the application of the delinquency regulations, and the Court may thus find it unnecessary to reach the broader issue of the validity of the delinquency procedures as a whole, including the important "reclassification" provisions, in order to dispose of this case. Accordingly, we first show that the regulations, viewed in their narrower perspective, authorize the priority induction of registrants who, while in the I-A pool of manpower readily available for call, are declared delinquent for failing to comply with a duty under the Selective Service law. In the event that the Court should conclude that there is no difference in principle between accelerating the induction of a registrant already classified I-A and delinquency reclassification accompanied by acceleration of induction, as petitioner contends, we then show that the regulations,

considered in their entirety, including the reclassification provisions, are valid. It will at all events be necessary for the Court to reach the broader issue in the companion *Breen* case (if the merits of that case are considered), as well as in other cases pending before the Court, all of which involve delinquency reclassifications.

1. In the limited circumstances of this case, and particularly in view of the specific findings of the district court, petitioner was validly ordered to report for accelerated induction as a delinquent. Here the district court expressly found that petitioner's delinquency resulted from his failure to have his registration and classification cards in his possession, as required by Selective Service System regulations at least implicitly sanctioned by this Court in *United States v. O'Brien*, 391 U.S. 367. That court specifically determined that neither General Hershey's recommendations to local boards nor petitioner's participation in political protest activity played any part in the board's determination.

Under 32 C.F.R. 1631.7, local boards are required to meet their monthly quotas by ordering registrants classified I-A to report for induction in, as far as pertinent, the following order: (1) delinquents; (2) volunteers; and (3) unmarried non-volunteers who have attained the age of 19 years but not the age of 26 years, with the oldest being selected first. Had petitioner not been declared a delinquent, then, he would have remained in the third category and, since he was only 20 years old at the time he was ordered to report for induction, he would probably not have

been so directed until some later date. In 50 U.S.C. App. 456(h)(1), as amended in 1967, Congress, in defining the term "prime age group," in a provision relating to student deferments, as the age group designated by the President from which selections for induction "are first to be made after delinquents and volunteers," can arguably be said to have implicitly approved the application of the delinquency procedures at least to registrants classified I-A, such as petitioner, whatever might be said about its intention regarding those entitled to statutory exemptions or deferments. Moreover, in 50 U.S.C. App. 455(a)(1), as the court below noted, Congress provided simply that "[t]he selection of persons for training and service * * * shall be made in an impartial manner, under such rules and regulations as the President may prescribe, from the persons who are liable for such training and service and who at the time of selection are registered and classified, but not deferred or exempted * * *." Petitioner was ordered to report for induction precisely in accordance with the mandate of this provision, and his priority status was consonant with the congressional intent manifested in the 1967 amendment to the statute.

As a registrant already classified I-A, petitioner was indisputably within the pool of manpower readily available for call for military training and service, unlike the exempt individual, such as involved in *Oestereich*. Under the present facts, petitioner was not subjected to any penal sanction so as to raise questions under the standards enunciated in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144. Thus, in the narrow

circumstances of this case, at least, the delinquency regulations were validly applied.

2. If the Court concludes it is necessary to reach the issue of the validity of the delinquency regulations viewed as a whole, including the key "reclassification" provisions, they should be held valid.

Although the Selective Service Act nowhere explicitly authorizes the President to deal with ~~delinquents~~ otherwise than through enforcement of the ~~general~~ provisions of 50 U.S.C. App. 462, the delinquency regulations reasonably implement the Act's broad purposes and policies and are authorized under the broad delegation to the President of the power to prescribe rules and regulations necessary to carry out the Act's provisions. That the delinquency regulations further the objectives of the Act has, in fact, been expressly recognized by Congress. The regulations have been in effect in substantially their present form since early in World War II, during which period Congress has on several occasions either substantially reenacted or broadly revised and amended the Act without changing or rescinding the regulations. When Congress substantially revised the Act in 1967, the committee reports of both Houses specifically noted the existence of the regulations, and Congress inserted a provision in the statute which for the first time gave explicit recognition to their existence.

Neither reclassification nor priority induction constitutes the infliction of punishment so as to call into play the constitutional safeguards that apply in criminal trials. While the requirement of the regulations

that delinquents be called for induction before all other registrants concededly bears some of the indicia of penal sanctions as summarized in *Kennedy v. Mendoza-Martinez*, *supra*, other criteria referred to in that opinion suggest a regulatory or remedial character and purpose therefor, and decisively distinguish that case.

The prime purpose of the delinquency regulations is a non-punitive one—to compel cooperation with the Selective Service System on the part of all draft-eligible young men. The objective is to discourage non-compliance with prescribed duties by those disposed to shirk their obligations by confronting them with an alternative prospect—a call to military service from which the registrant would normally be deferred or an earlier call-up than might normally be anticipated—which, while honorable, is sufficiently burdensome to most registrants to serve as an effective deterrent. Without some such device for coping with those less serious deviations from duty for which the delinquency procedures are fashioned, the Selective Service System could not function with nearly the effectiveness that the availability of this process permits.

Thus, the delinquency regulations attempt to deal with less serious breaches of duty through what in effect is a civilly coercive device. Through the issuance of a delinquency notice to a registrant in default, a return to compliance with the law on the registrant's part is first sought. Should this fail, an effort is made to make soldiers rather than defendants of those who persist in their delinquency by reclassify-

ing them I-A (if they are not already in that group) and ordering them to report for induction. Only in the case of those delinquents who exhibit the final defiance of refusal to submit to induction when ordered to do so is the Act's ultimate sanction—criminal prosecution—invoked. The suggested analogy to civil contempt is not faulty because under the regulations it is discretionary with the local board whether to remove from delinquency status a registrant who desires to correct his failure, whereas the respondent in a civil contempt proceeding is able to escape the threatened sanction simply by obeying the court's order. A fair reading of the applicable regulation in the context of the regulations as a whole suggests that, at least up to the time of the issuance of the order to report for induction, it would be an abuse of discretion for a board to refuse removal in the case of a registrant who sought in good faith to correct his breach of duty.

Another non-punitive purpose served by the delinquency regulations is the sustaining of non-delinquent registrants' morale. The realization that those who shirk their duties do not profit from their delinquency and are required under the law to "go first" helps ease the hardships of compliance for those registrants who discharge their responsibilities under the Act.

That a purpose of the delinquency procedures is to deter non-compliance with duty is not inconsistent with the sanction's regulatory character. Many unquestionably non-punitive sanctions—*e.g.*, disbarment and deportation—have deterrence as a principal if not *the* principal end.

Nor are the delinquency regulations invalid for failing to provide procedural due process. Notice and hearing are amply provided for by the regulations themselves. In any event, there is no occasion in the instant case to consider what the minimum essentials required by the Constitution are in this regard, since petitioner admittedly had notice of his delinquency and has never sought a hearing.

Finally, the delinquency regulations are not unconstitutionally vague or overbroad. They simply incorporate the duties imposed on registrants by the Selective Service Act and regulations, none of which petitioner has shown to be impermissibly vague or overbroad. The requirement involved here—carrying draft cards—is certainly specific and narrow. And, as applied to that duty, the delinquency regulations neither infringe First Amendment liberties nor are unrelated to the registrants' status under the Act. Cf. *United States v. O'Brien*, 391 U.S. 367. Petitioner's claim that he had a right to "turn in" his draft cards as a gesture of political protest differs in no essential way from the claim made and rejected in *O'Brien*. He had a duty to keep his draft cards in his possession, and the board was authorized to declare him delinquent for failure to perform that duty. He made no effort to cure the delinquency. The regulations are both authorized by the Act and constitutionally valid.

II

It was not necessary for the government, in order to prove that petitioner willfully failed to submit to induction, to show that he was given and that he re-

fused the opportunity to take the ceremonial "one step forward" which symbolically marks the transition from civilian to military status. While the taking of the ceremonial step marks the *culmination* of the induction process, submitting to induction includes submitting to the physical and mental examinations by which the registrant's fitness for service is tested. It would not be appropriate to require induction center personnel to ask a registrant to take the ceremonial step before he had been determined to be qualified for induction. By refusing to undergo any of the examinations designed to test his acceptability for service in the Armed Forces, petitioner willfully failed to submit to induction.

III

The indictment charged a single offense—failure to comply with an order of the local board. The charge was not duplicitous because the order directed petitioner to do two things—report for *and* submit to induction. The undisputed evidence showed that petitioner failed to comply with the latter aspect of the directive, thus violating the order viewed in its totality. Petitioner was not misled regarding the nature of the offense charged, and his contention that the indictment was deficient borders on the frivolous.

ARGUMENT

I. PETITIONER WAS VALIDLY ORDERED TO REPORT FOR ACCELERATED INDUCTION AS A DELINQUENT

Petitioner broadly challenges the delinquency regulations, pursuant to which he was presumably ordered

to report for induction at an earlier date than he normally would have been called, as unauthorized by the Selective Service Act (Pet. Br. 26-35), unacceptably vague (Pet. Br. 35-43), violative of constitutional restrictions upon the imposition of punitive sanctions (Pet. Br. 44-49), invalid for failure to provide procedural due process, even viewed as a civil regulatory measure (Pet. Br. 49-51), and, as applied here to the charged failure to retain possession of his draft cards, offensive to First Amendment liberties (Pet. Br. 51-58). In addition, he challenges the induction directive as unauthorized by the delinquency regulations themselves (Pet. Br. 61-66). Before proceeding to consider these contentions, it will be helpful to summarize the main provisions of the regulations and to note those which are, and those which are not, directly involved in the present case.

A. DELINQUENCY: THE REGULATORY SCHEME

1. *Duties of registrants.* A "delinquent" is defined by the regulations as a person required to be registered who fails or neglects to perform any duty required of him under the Selective Service law (32 C.F.R. 1602.4). "[S]elective service law" is comprehensively defined to include the Act itself and all rules and regulations thereunder (32 C.F.R. 1602.10). A registrant's duties include, in addition to the basic duty of registration itself (32 C.F.R. 1611.1), the obligations, for example, of completing and returning a classification questionnaire within a prescribed period of time (32 C.F.R. 1621.10), correcting or supplementing a questionnaire upon request (32 C.F.R.

1621.13), reporting in writing within ten days of its occurrence any fact that might result in a change of classification, including any change in occupational, marital, military, or dependency status (32 C.F.R. 1625.1(b), 1641.7(a)), keeping one's local board advised of one's mailing address (32 C.F.R. 1641.3), and reporting, when ordered, for an Armed Forces pre-induction physical examination (32 C.F.R. 1628.16(a), 1628.17(f)).⁵ The specific duty involved here is that of retaining in one's possession at all times one's registration certificate (32 C.F.R. 1617.1) and current classification notice (32 C.F.R. 1623.5)—colloquially called "draft cards."

2. *Declaration of delinquency.* Whenever a registrant has failed to perform a duty or duties other than that of complying with an "Order to Report for Induction or Order to Report for Civilian Work,"⁶ the local board "may" declare him to be a delinquent (32 C.F.R. 1642.4(a)). When a board makes such a declaration, it "shall" enter a record of its action and the date on the registrant's classification questionnaire, complete a delinquency notice (SSS Form No. 304) in duplicate stating the duty or duties not performed,

⁵ Other responsibilities include keeping informed of one's draft status (32 C.F.R. 1641.5), submitting to medical examination by the local board's medical advisor upon request (32 C.F.R. 1628.3(a)), advising the board, if one is in custody, when one is released (32 C.F.R. 1642.33), and submitting evidence of one's status to a board other than one's own upon request based on suspicion of delinquency (32 C.F.R. 1642.41(c)).

⁶ Orders of the latter type are issued to I-O registrants, *i.e.*, those conscientiously opposed to participation in war in any form. Cf. 32 C.F.R. 1622.14, 1660.1-1660.31.

mail the original to the registrant at his last known address, and file the copy in his cover sheet (32 C.F.R. 1642.4(b)).

The delinquency notice advises the registrant that he has been declared a delinquent because of his failure to perform a duty or duties required of him; specifies the nature of the duty or duties; directs the registrants to report to the issuing board immediately in person or by mail, or to take the notice to the local board nearest him, for advise^d as to what he should do; informs him that his willful failure to perform the duty or duties is a violation of the Selective Service Act punishable by up to five years' imprisonment or a \$10,000 fine, or both; and notes that as a consequence of the breach of duty he is liable to be given a I-A classification as a delinquent and ordered to report for induction.⁷ A registrant who has been declared delinquent "may" be removed from that status by the board "at any time"; when a delinquency is removed,⁸ the board is required to record its action and the date on the classification questionnaire, advise the registrant of the removal, and place a copy of the letter of notification in his cover sheet (32 C.F.R. 1642.4(c)). No registrant may be classified in or reclassified into I-A, I-A-O,⁹ or I-O¹⁰ as a delinquent, or

⁷ A copy of the delinquency notice—the document served on petitioner in this case—appears in the record at A. 44.

⁸ No procedure for effecting removal is prescribed by the regulations.

⁹ A registrant classified I-A-O is a conscientious objector available for non-combatant military service only (32 C.F.R. 1622.11).

¹⁰ A registrant classified I-O is a conscientious objector available for civilian work contributing to the maintenance of the national health, safety, or interest (32 C.F.R. 1622.14).

ordered to report for priority induction as a delinquent, unless he has been declared a delinquent in accordance with these procedures and has not subsequently been removed from that status (32 C.F.R. 1642.10).

3. *Classification or reclassification as a delinquent.* A delinquent registrant between the ages of 18½ and 26—and under certain conditions one who is older¹¹—may be classified in or reclassified into I-A, I-A-O, or I-O (whichever is applicable) “regardless of other circumstances” (32 C.F.R. 1642.12).¹² One so classified or reclassified is entitled to appear personally before the local board to contest his classification “under the same circumstances as in any other case” (32 C.F.R. 1642.14(a); cf. 32 C.F.R. 1624.1–1624.3), and may appeal administratively from his classification as in any other case (32 C.F.R. 1642.14(c); cf. 32 C.F.R. 1626.1–1627.8). A delinquency classification or reclassification may be reopened at any time before induction, in the discretion of the local board, “without regard to the restrictions against reopening prescribed in [32 C.F.R.] 1625.2”¹³ (32 C.F.R. 1642.14(b)).

¹¹ The conditions relate to the older registrant's prior enjoyment of a deferred status.

¹² A proviso to the cited regulation states that a registrant who by reason of service in the Armed Forces is eligible for IV-A classification (veterans; see 32 C.F.R. 1622.40) may not be classified in or reclassified into I-A, I-A-O, or I-O as a delinquent without the special authorization of the Director of Selective Service.

¹³ 32 C.F.R. 1625.2 authorizes a local board to reopen a classification, at the registrant's request or on its own motion, on the basis of facts not previously considered which, if true, would justify a change of classification, provided, in either

4. *Priority induction.* When a call is made to local boards to furnish men for the Armed Forces "without designation of age group or groups," each local board is required to meet its quota from among its I-A and I-A-O registrants by ordering them to report for induction in the following order: (1) delinquents 19 years of age and older in the order of their births; (2) volunteers under 26 in the order in which they volunteered; and (3) non-volunteers, in four prescribed categories based on age and marital status (32 C.F.R. 1631.7(a)). If the call is placed "with designation of age group or groups," delinquents 19 and older and under-26 volunteers still must be called first (in that order), followed by non-volunteers of the designated age group (32 C.F.R. 1631.7(b)). In either case, though non-delinquent non-volunteers must previously have been found acceptable for service by the Armed Forces and have been mailed statements of acceptability at least 21 days before their scheduled induction date, these requirements need not be followed in the case of delinquents and volunteers. Notwithstanding these provisions, a local board may in its discretion determine not to order a delinquent registrant to report for induction if the United States Attorney requests that it not do so (32 C.F.R. 1642.13).

event, that the classification may not be reopened after the board has mailed an order to report for induction unless the board first specifically finds that there has been a change in the registrant's status resulting from circumstances over which he had no control. Cf. *DuVernay v. United States*, 394 F. 2d 979 (C.A. 5), affirmed by an equally divided Court, 394 U.S. 309.

B. BECAUSE PETITIONER WAS ALREADY CLASSIFIED I-A WHEN HE WAS DECLARED DELINQUENT, ONLY THE VALIDITY OF THE DELINQUENCY REGULATIONS IN CAUSING ACCELERATED INDUCTION IS NECESSARILY INVOLVED

Unlike the registrants in *Oestereich v. Selective Service Bd.*, 393 U.S. 233, and the companion case of *Breen v. Selective Service Local Board No. 16*, No. 65, this Term, as well as *United States v. Eisdorfer*, No. 330, this Term, and *United States v. Stewart*, No. 637, this Term, both pending on direct appeals to this Court, petitioner was not reclassified I-A as a result of his delinquency.¹⁴ He was already classified I-A both when the violation for which he was declared delinquent was committed and when the declaration of delinquency was made (see *supra*, pp. 4-5). Indeed, petitioner does not contest that classification here. Rather, his claim is essentially that his induction as a I-A registrant was improperly *accelerated*

¹⁴ *Oestereich* involved the delinquency reclassification to I-A of a registrant statutorily entitled to a IV-D ministerial student exemption—an action held by this Court to have been unauthorized by the Act. *Breen* involves the delinquency reclassification of a college student classified II-S (a deferred status) to I-A; the Second Circuit found it unnecessary to reach the merits of the reclassification, however, in consequence of its determination that it lacked jurisdiction under the Act to consider the issue in the context of a pre-induction suit for injunctive relief, in view of the bar of amended Section 10(b) (3) (406 F. 2d 636), a position we urge in this Court. *Eisdorfer* involves the delinquency reclassification of a I-D registrant (exempt as a reservist) to I-A pursuant to a finding by the local board that the I-D classification had been obtained fraudulently. *Stewart*, like *Breen*, involves the delinquency reclassification of a II-S registrant, but in the context of a criminal action for failure to submit to induction.

in consequence of the determination of delinquency.¹⁵ Thus, the validity of delinquency reclassification is not directly presented here, although petitioner takes the position that his shift to priority induction status, as a result of a declaration of delinquency, is not in principle distinguishable from the reclassification situation.

If in consequence of the narrow factual context in which this case arises the Court should be of the view that it is possible to decide the case without reaching the broader issue of the validity of the delinquency procedures as a whole (including the key "reclassification" feature), petitioner's conviction can be defended on relatively narrow grounds, as set forth hereafter (*infra*, pp. 25-32). Should the Court conclude, on the other hand, that accelerating the induction of a registrant already classified I-A, in consequence of an act of delinquency, and delinquency reclassification coupled with accelerated induction are indistinguishable in principle, as petitioner urges, it becomes necessary to reach the broader issue—the validity, in effect, of the delinquency procedures viewed as a total process. We subsequently show that the regulations considered in this overall aspect are valid (*infra*, pp. 32-67). It is pertinent to note at this point that even if the Court should conclude that it is possible or desirable to dispose of the present case on the basis of the narrow considerations first presented,

¹⁵ Petitioner's occasional references in his brief to his having been "reclassif[ied]" pursuant to the delinquency procedures (Pet. Br. 51, 52, 53) are evident inadvertences. The brief elsewhere notes that in petitioner's case the declaration of delinquency did not involve reclassification (Pet. Br. 5, 15).

those considerations are inadequate as a basis of decision either in the companion *Breen* case (if the Court reaches the merits of that case, see note 14, *supra*) or the aforementioned *Stewart* and *Eisdorfer* cases (both pending on direct appeal), since all three of those cases involve delinquency reclassifications to I-A of registrants who had previously been otherwise classified. Thus, the more comprehensive arguments which we make are at all events pertinent to, and must be reached in, those other cases.

C. IN THE NARROW CIRCUMSTANCES OF THE INSTANT CASE, AND IN VIEW OF THE DISTRICT COURT'S FINDINGS, THE DELINQUENCY REGULATIONS WERE VALIDLY APPLIED NOTWITHSTANDING PETITIONER'S ACCELERATED INDUCTION, IRRESPECTIVE OF THE VALIDITY OF DELINQUENCY RECLASSIFICATION

Preliminarily, we note that there was no showing made that petitioner, who was already classified I-A, in fact had his induction accelerated at all as a result of his local board's declaring him a delinquent. He made no offer of proof in this regard, and the district court made no finding on this point. Rather, the lower court simply noted that "[i]t was not contended at trial that the defendant's classification was improper," and concluded that "[t]here is a basis in the record" for his I-A classification (A. 27). However, the district court seemed implicitly to assume that petitioner's induction had been accelerated, in concluding that the order to report for induction resulted from his violation of the possession requirement (see A. 30, 31). And, in light of the pattern of the pertinent regulation (32 C.F.R. 1631.7), it is unlikely that petitioner, who was 20 years of age when ordered to report for

induction, would have been called at such an early date had he not been declared a delinquent. Under that regulation, unmarried non-volunteers classified I-A between 19 and 26 are called, after delinquents and volunteers, in order of their births, the oldest first. Moreover, petitioner's order to report bore on its face the stamped word "Delinquent" (G. Ex. 1, Item 25). And the court of appeals stated, "Admittedly, defendant's induction date was advanced pursuant to Tit. 50 U.S.C. § 456(h)(1) which gives priority of induction to 'delinquents'" (A. 36). Particularly in view of this statement, we assume, as did the court below, that petitioner would not have been called when he was called but for his delinquent status and the priority of induction that went along with it.

Specific findings of the district court provide strong support for the position that the present application of the delinquency regulations so as to accelerate the induction of a registrant already classified I-A was both consistent with the Act and suffered from no constitutional infirmity. First, the lower court found that the declaration of delinquency did not result from petitioner's "expressions of opposition to the Vietnam war," but rather from his violation of the possession regulations (A. 30).¹⁶ In addition, the court determined that "[t]he evidence in the record clearly shows that [petitioner] was declared delinquent and ordered to report for induction, not by authority of the so-

¹⁶ In similar fashion, the court of appeals rejected this claim, noting that the district court "found that there was no evidence at trial to support defendant's contention that his delinquency order was based upon his political views" (A. 35).

called Hershey memorandum, but because of [his] non-possession of the required Selective Service cards in violation of the regulations" (A. 31).¹⁷ Thus, the district court expressly found that petitioner's delinquency resulted from neither the fact of his participation in political protest activity nor from an application of General Hershey's recommendations by his local board. Rather, his change in status was attributed by the lower court solely to his violation of the requirement of the regulations that he have his registration and classification cards in his possession at all times (32 C.F.R. 1617.1, 1623.5).

Petitioner's contention that the possession requirement is invalid since it interferes with "symbolic speech" protected by the First Amendment and serves no useful regulatory purpose is refuted by this Court's decision in *United States v. O'Brien*, 391 U.S. 367. Of course, the Court did not squarely consider the validity of the possession requirement in *O'Brien*, but rather a challenge to the constitutionality of the draft-card burning statute under which the defendant there had been convicted. But the Court's opinion in that case expressly rejected First Amendment arguments

¹⁷ Just prior to this statement, the district court had noted that "[r]eference was made in the trial to a certain Local Board memorandum issued by National Selective Service Director Hershey recommending procedures to be followed by local Selective Service Boards in the cases of registrants participating in anti-Vietnam demonstrations" (A. 31). As noted previously (see note 3, *supra*), what the court had in mind was probably not the "memorandum" issued by General Hershey (see Pet. Br. App. 20-21), but rather a "letter" sent by him to all local boards at about the same time (see Pet. Br. App. 18-20). For simplicity, we shall refer to these two documents as General Hershey's "recommendations".

identical to those made here regarding the validity of the possession regulations, and in so doing determined that the possession requirement served a legitimate and useful purpose in furthering the effective functioning of the Selective Service System (see 391 U.S. at 376-380). That requirement serves to ensure the "continuing availability" of Selective Service certificates no less than the statutory provision at issue in *O'Brien* (e.g., 391 U.S. at 381). That need was found sufficient to justify the prohibition on destruction there, and is plainly adequate to support the validity of the possession regulations here (see also *infra*, pp. 65-67). In view, then, of the district court's findings and the clear validity of the possession regulations which petitioner concededly violated, the delinquency procedures can properly be applied to effect his accelerated induction, regardless of their validity where a reclassification from an exempt or deferred status is involved.

As the court of appeals pointed out, the fact that no reclassification is involved here results in a substantial distinction, insofar as congressional intent is concerned, between this sort of case and one in which the registrant declared delinquent was not previously classified I-A. In the 1967 revision of the Selective Service Act, Congress, in defining the term "prime age group" as used in a provision relating to student deferments, declared the term to mean "the age group which has been designated by the President as the age group from which selections for induction into the Armed Forces are first to be made after delinquents and volunteers" (50 U.S.C. App. (Supp. IV) 456

(h)(1)). The reference to the regulations was obviously to the order-of-call categories created by 32 C.F.R. 1631.7. That regulation establishes the sequence in which I-A and I-A-O registrants are to be ordered inducted. Congress, in enacting the provision referred to, gave explicit recognition, for the first time, to the delinquency concept. More important, for present purposes, Congress did so in the context of a reference to a regulation which relates exclusively to I-A (and I-A-O) registrants. It can thus be said that Congress gave implicit approval to the delinquency procedures established by the regulations at least as regards registrants already classified I-A as of the time of the declaration of delinquency. Unlike the situation with respect to those in a status exempted by statute, there are no arguably conflicting manifestations of congressional intent, such as the Court found in *Oestereich*, which might be thought to defeat delinquency-triggered induction.

Moreover, in 50 U.S.C. App. 455(a)(1), Congress can arguably be said to have drawn an explicit distinction in this regard. That provision states that "[t]he selection of persons for training and service * * * shall be made in an impartial manner, under such rules and regulations as the President may prescribe, from the persons who are liable for such training and service and who at the time of selection are registered and classified, but not deferred or exempted * * *." As the court below pointed out, both the delinquency and priority of induction provisions are just such rules and regulations as the Selective Service System is authorized, pursuant to this sec-

tion, to adopt. Those regulations were applied here in "an impartial manner" since their application was occasioned by a plain violation of valid regulations, not for some discriminatory purpose. As the court of appeals concluded, there is "no legal reason why the order of call cannot be administratively altered as long as it is done 'impartially' without discrimination" (A. 36). In view of the board's "administrative discretion in carrying out congressional policy," the application of the delinquency regulations was "reasonably related to a governmental interest" and was justifiable where "its effect does not otherwise punish an individual by depriving him of a right given him by statute" (A. 37). Since only "the order of call for induction of those already classified 1-A" was involved here, the court below determined that application of the delinquency procedures was a "reasonable condition" that lawfully could "be administratively attached to it" (A. 37). In concluding, the court noted that petitioner had notice of his delinquency and an opportunity to correct it (A. 37). Since his right to be called in a particular order "was one which had been given only by administrative grace and which had been reasonably conditioned upon overall compliance with the Selective Service laws," his accelerated induction, the court concluded, "was not lawless or irregular" (A. 38). That determination, we submit, is, in the narrow circumstances of this case, a correct one and should be upheld, whatever the Court may conclude as to the validity of delinquency reclassification.

Petitioner was plainly within the pool of manpower readily available for call for military training and service. All that stood between him and an immediate callup was the level of manpower needed. He admittedly violated a valid provision of the regulations. As a result of this violation he was declared a delinquent, an action wholly consistent with the statutory scheme and in no sense inconsistent with congressional intent. Had any reliance been found to have been placed on either General Hershey's recommendations or petitioner's participation in political protest activities, a question could be raised as to the impartial and even-handed administration of the delinquency procedures. But the district court here made specific findings that neither of these matters played any role in the local board's action, and those findings were concurred in by the court of appeals. They are thus entitled to considerable deference by this Court. See *Berenyi v. Immigration Director*, 385 U.S. 630, 635. Nor can it be said, under the present facts, that petitioner was subjected to any penal sanction so as to raise any issue regarding the imposition of punishment without constitutional safeguards under the tests enunciated in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169. As the court of appeals emphasized, "we are not confronted here with a reclassification which has no basis in fact or which attempts to deprive the defendant of any existing statutory exemption or deferment" (A. 36-37). At most, all that happened to petitioner, as a result of his violation of the regulations and his failure to rectify his delinquency, was that he was ordered to report for in-

duction somewhat sooner than he otherwise might have been. In these narrow circumstances, the delinquency regulations, in triggering accelerated induction, constitute a lawful means for carrying out the objectives of the Selective Service Act in providing manpower for the Armed Forces.

D. SHOULD THE COURT DEEM IT NECESSARY TO REACH THE ISSUE OF THE VALIDITY OF THE DELINQUENCY PROCEDURES VIEWED AS A WHOLE, INCLUDING THE PROVISION FOR DELINQUENCY RECLASSIFICATION, THE REGULATIONS ARE VALID

In the ensuing discussion, as previously noted, we proceed on the assumption that there is no distinction in principle between accelerating the induction, for delinquency reasons, of a registrant who is already classified I-A and the delinquency reclassification to I-A (accompanied by expedited induction) of a registrant who has an otherwise valid claim to deferment. It is the position of the government that, with the narrow exception of the situation involved in the *Oestereich* case, 393 U.S. 233 (delinquency reclassification to I-A of a registrant possessing an unqualified *statutory exemption*), the scheme of the regulations is authorized by the Act and suffers from no constitutional infirmity.

1. *The delinquency regulations are authorized by the Act and have been implicitly approved by Congress*

Although the Selective Service Act nowhere explicitly authorizes dealing with violations of the Act or regulations otherwise than by a criminal prosecution pursuant to the general penal provisions, the

delinquency regulations reasonably implement the Act's general purposes and policies and are authorized under the broad delegation to the President of the power to prescribe rules and regulations necessary to carry out the provisions of the Act (50 U.S.C. App. 460(b)(1)). Where a registrant fails to perform a duty required of him under the Act or regulations (thereby becoming, by definition, a delinquent), it is obviously beneficial both to him and to the Selective Service System that he not be immediately subjected to criminal prosecution for his violation. It may often happen that the registrant's failure to comply was either inadvertent or impulsive and that, given the chance to reflect upon his conduct and the potential consequences thereof, he would choose a different course of action and take steps to purge his delinquency. In effect, the operation of the delinquency regulations postpones the imposition of criminal punishment under 50 U.S.C. App. 462 and gives the registrant an opportunity to bring himself back into compliance with the law. And the delinquent is allowed to correct his delinquency, under the provisions of 32 C.F.R. 1642.4, at any time. Although removal from delinquency status is discretionary with the local board (but see *infra*, pp. 52-54), there is no reason to speculate here that the board might have refused to remove petitioner's delinquent status had he in good faith sought to bring himself back into compliance. To the contrary, the record indicates that petitioner made no attempt to correct his delinquency and had no intention of doing so.

That the delinquency regulations further the objectives of the Act has, in fact, been expressly recognized by Congress. The regulations have been in effect, in substantially their present form, since the enactment of the Selective Service Act of 1948 (62 Stat. 604).¹⁸ Indeed, the current regulations are substantially similar to those in effect since early in World War II,¹⁹ and thus the concept goes back almost thirty years. During this lengthy period Congress, although presumably aware of the regulations, did nothing to change or rescind them. This inaction by Congress is of particular significance in light of the fact that on at least four occasions during this period—in 1946, 1948, 1951, and 1967—it either substantially reenacted or broadly revised and amended the basic conscription

¹⁸ See Selective Service regulations issued September 17, 1948 (13 Fed. Reg. 5479, 5483): §§ 631.7 and 642.13 (priority induction); § 642.12 (classification or reclassification as a delinquent); § 642.14(a) (right of personal appearance as in any other case); § 642.14(b) (classification reopenable at any time before induction without regard to otherwise applicable general restrictions); § 642.14(c) (classification appealable as in any other case).

¹⁹ See Selective Service regulations issued October 4, 1943 (8 Fed. Reg. 14116): § 642.12(a) (classification or reclassification as a delinquent); § 642.13(a) (delinquents to be inducted as soon as possible after required 10-day notice without reference to order-number sequence or dependency groups); § 642.14(a) (right of personal appearance as in any other case); § 642.14(b) (classification reopenable at any time before induction unless board determines delinquency was knowingly incurred); § 642.14(c) (classification appealable as in any other case; if appeal board finds registrant knowingly became delinquent, it confirms the I-A, I-A-O, or IV-E (now I-O) delinquency classification or reclassification; otherwise, it disregards the delinquency and classifies in usual manner).

statute in effect throughout virtually the entire span.²⁰ As this Court has often indicated, a consistent and long-continued interpretation of an enactment by the administrative agency charged with its enforcement, particularly when Congress has reenacted the statute without repudiating the construction, is entitled to great weight in determining the correctness of the interpretation or the existence of the claimed authorization for a regulation. *Commissioner v. Noel Estate*, 380 U.S. 678, 681-682; *Massachusetts Trustees v. United States*, 377 U.S. 235, 241-242; *National Labor Relations Board v. Gullett Gin Co.*, 340 U.S. 361, 365-366; *Francis v. Southern Pacific Co.*, 333 U.S. 445, 449-450; *Fleming v. Mohawk Co.*, 331 U.S. 111, 116; *Billings v. Truesdell*, 321 U.S. 542, 552-553; *Morgan v. Commissioner*, 309 U.S. 78, 81; *Helvering v. Winmill*, 305 U.S. 79, 82-83; 2 Sutherland, *Statutes and Statutory Construction*, §§ 5107, 5109 (3d ed. 1943).²¹

²⁰ The Selective Training and Service Act of 1940 (54 Stat. 885), the conscription statute in effect during World War II, was expressly reenacted in 1946 except as to specified provisions (Act of June 29, 1946, § 1, 60 Stat. 341). The 1946 Act expired by operation of law on March 31, 1947 (§ 7, 60 Stat. 342), but fifteen months later Congress reactivated the draft with the enactment of the Selective Service Act of 1948 on June 24 of that year (62 Stat. 604). In 1951, the 1948 Act was broadly amended and redesignated the Universal Military Training and Service Act (65 Stat. 75). In 1967, the Act was again substantively revised and renamed the Military Selective Service Act of 1967 (81 Stat. 100).

²¹ Nothing in *Leary v. United States*, 395 U.S. 6, relied on by petitioner (Pet. Br. 31), is inconsistent with the principle referred to. *Leary* involved a regulation which *conflicted with* the statute (395 U.S. at 24-25). Where such conflict exists, the principle of implied approval through reenactment has, of course, no place (see 395 U.S. at 25).

Nor is the inference of congressional ratification merely a negative one based on repeated reenactment without repudiation. When Congress substantially revised the Act in 1967, it is significant that the committee reports of both Houses specifically noted the existence of the delinquency regulations (S. Rep. No. 209, 90th Cong., 1st Sess., pp. 3, 6; H. Rep. No. 267, 90th Cong., 1st Sess., p. 17). Even more significantly, in its 1967 revision of the Act, Congress not only failed to modify the delinquency regulations, but it inserted a provision in the statute which for the first time gave express recognition to them. Section 6(h)(1) of the Act as amended (50 U.S.C. App. (Supp. IV) 456(h)(1)), after referring to the "prime age group" of registrants in a provision relating to student deferments, defines that term to mean "*the age group which has been designated by the President as the age group from which selections for induction into the Armed Forces are first to be made after delinquents and volunteers*" (emphasis added).²² See also Section 5(a)(2) of the Act, as amended in 1967 (50

²² Petitioner's suggestion that the Act's "reference to 'delinquents' could as easily have been intended to refer to 'undeclared delinquents'" as to registrants who have been declared delinquent under the regulations (Pet. Br. 31) is baseless. The Act's reference to "the age group which has been designated by the President as the age group from which selections for induction into the Armed Forces are first to be made after delinquents and volunteers" is an evident allusion to 32 C.F.R. 1631.7. That regulation, providing for the priority induction of delinquents and volunteers ahead of all other registrants, is in turn linked to 32 C.F.R. 1642.13, which calls for the induction of delinquent registrants "in the manner provided in section 1631.7 of this chapter [*i.e.*, 32 C.F.R. 1631.7]." In its context as part of Part 1642 of the regulations

U.S.C. App. (Supp. IV) 455(a)(2)), by which Congress prohibited the President from changing the order of induction by age groups in effect on the date of the amendment without specific subsequent statutory authority. As noted previously (see *supra*, p. 22), the administratively established induction sequence calls for the induction of delinquents 19 years of age and older before registrants of all other categories. In short, the delinquency regulations as they now stand are an accepted and long-established feature of the Selective Service System, which Congress has at least implicitly ratified and sanctioned.

In light of Congress' implied ratification of the delinquency procedures, there is no merit in petitioner's contention that Congress's delegation to the President of authority to make such regulations is void for want of standards (Pet. Br. 32-35). In all events, insofar as the challenged regulations constitute a reasonable implementation of the delegated power to raise armies through the conscriptive process (see *infra*, pp. 45-58), the authority to make the regulations is fairly to be found within the general grant of power to the President to prescribe "the necessary rules and regulations to carry out the provisions of" the Act (50 U.S.C. App. 460(b)(1)). Cf. *Falbo v. United States*, 320 U.S. 549, 552; *Selective Draft Law Cases*, 245 U.S. 366.

It may be said that the Court in *Oestereich v.*

(dealing generally with "Delinquents"), it is evident that 32 C.F.R. 1642.13 is exclusively concerned with registrants who have been *declared* delinquent, pursuant to the procedures prescribed by 32 C.F.R. 1642.4.

Selective Service Bd., 393 U.S. 233, has rejected the argument that Congress implicitly authorized delinquency reclassification. There are, however, arguable distinctions between that case and other situations where delinquency reclassification is involved. Indeed, it would seem proper to differentiate between administrative action purporting to take away a *permanent exemption* from military service (which *Oestereich* held unauthorized) and cancelling a *temporary deferment* (as in the case of a college student reclassified I-A because of a declaration of delinquency, such as in the companion *Breen* case).

2. *Neither reclassification nor priority induction is punitive within the meaning of the Constitution's restrictions on the infliction of punishment without the requisite safeguards*

The question remains whether the delinquency regulations, as a general matter, operate as a penal sanction, imposed without the procedural safeguards which the Constitution prescribes.²³ In *Kennedy v. Mendoza-*

²³ In the government's brief in the *Oestereich* case (pp. 44-58), it was indicated that in some circumstances the operation of the delinquency regulations might raise serious statutory and constitutional questions. But that was suggested in relation to a situation where application of these regulations had the effect of removing a registrant from a statutorily exempt status. There, moreover, it was not entirely clear that the local board had not, at the invitation of General Hershey, triggered the operation of the delinquency regulations to punish the registrant's participation in political protest activity. As indicated in that brief (p. 43), if General Hershey's recommendations be viewed as construing the lawful scope of the delinquency regulations too broadly, the proper response is to correct his interpretation rather than invalidate the regulations themselves. See *National Student Ass'n v. Hershey*, 412 F.2d 1103 (C.A.D.C.), where the court of appeals took that course.

Martinez, 372 U.S. 144, this Court held that the denationalization of a native-born citizen, for departing from or remaining without the United States in time of war or national emergency for the purpose of avoiding military service, was a punitive measure which Congress could not impose without affording the procedural safeguards guaranteed by the Fifth and Sixth Amendments.²⁴ There the Court described "the tests traditionally applied to determine whether an Act of Congress is penal or regulatory in character" in the following language (372 U.S. at 168-169):

Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions. Absent conclusive evidence of congressional intent as to the penal nature of a statute, these factors must be considered in relation to the statute on its face. * * *

In *Mendoza-Martinez* the court found "detailed examination along such lines" unnecessary because the "ob-

²⁴ *E.g.*, indictment, trial by jury, confrontation by witnesses, compulsory process for obtaining favorable testimony, and the right to counsel.

jective manifestations" of the congressional purpose, as reflected in the statute's legislative history, pointed conclusively to its punitive character (*id.* at 169). The Court noted, on the other hand, that the problem had, in other cases, been "extremely difficult and elusive of solution" (*id.* at 168).

a. The *Mendoza-Martinez* criteria, applied to the sanction involved in this case, admittedly point, in the words of the Court, "in differing directions." The requirement of the regulations that a I-A registrant as to whom an unremoved declaration of delinquency has been made by his local board be inducted before all other registrants concededly bears *some* of the indicia of a penal sanction as summarized in the Court's opinion. For example, the sanction undoubtedly "comes into play only on a finding of *scienter*"²⁵ and

²⁵ It is at least clear that an *inadvertent* failure by a registrant to comply with a duty—provided he promptly remedied the neglect when his attention was called to it, through a delinquency notice or otherwise—would almost certainly never eventuate in the imposition of the sanction, and in our view could not validly do so. That it would be at least an abuse of discretion for a board to impose the sanction of priority induction in the case of the innocent or merely careless delinquent would appear to be implicit in the provisions that one who has been declared a delinquent may be removed from that status at any time (32 C.F.R. 1642.4(c)) and that classification or reclassification as a delinquent may be reopened at any time before induction, without regard to generally applicable restrictions on reopening (32 C.F.R. 1642.14(b)). It is apparent from the delinquency regulations as a whole that the overriding objective is to encourage the prompt correction of unintentional delinquencies and the prompt purging of those that may have been willful.

"the behavior to which it applies is already a crime."²⁶ In a sense, moreover, the sanction "involves an affirmative disability or restraint"—i.e., change in status resulting in enforced induction²⁷—though it is evident that the "restraint" has little real significance in this context since it is of precisely the same character as that of non-delinquent inductees, whose status manifestly has no punitive aspect (see *infra*, pp. 42-45). And the operation of the sanction will concededly promote one of the "traditional aims of punishment," deterrence²⁸—although, as stressed below (*infra*, pp.

²⁶ I.e., knowingly failing to perform a duty imposed by the statute or regulations—an offense under 50 U.S.C. App. 462(a). Where *scienter* is lacking, the regulations appear to contemplate that the registrant may in some circumstances be declared delinquent (32 C.F.R. 1642.4(a) and (b))—subject, however, to removal from that status upon correction of the neglect following notice (32 C.F.R. 1642.4(c)). It is at all events clear that, as pointed out in the preceding footnote, an inadvertent neglect of duty would as a practical matter never result in the issuance of a priority induction order.

²⁷ The availability of habeas corpus to secure release from the Armed Forces where induction has been improper (see, e.g., *Eagles v. United States ex rel. Samuels*, 329 U.S. 304) sufficiently attests to the "restraint" that induction has traditionally been thought to entail.

²⁸ The Court in *Mendoza-Martinez* coupled "retribution" with deterrence as the "traditional aims of punishment" (372 U.S. at 168). Insofar as "retribution" implies the vindictive, vengeful, or retaliatory infliction of harm in requital for past misdeeds, neither priority induction nor delinquency reclassification promotes or was intended to effect such an aim. The acceleration of the process by which a registrant is inducted into a status bearing no stigma of any kind (rather, the contrary) and to which he will in all likelihood be subjected in any event sooner or later can in no way be regarded as an act of vengeance or vindictiveness. Nor can delinquency reclassification be so viewed. In view of the opportunity which a regis-

59-61), mere deterrent effect, even where intended, does not always signify a penal sanction. Moreover, where delinquency reclassification and not simply priority induction is involved, the impact of these factors is certainly greater. On the other hand, the other criteria referred to in the *Mendoza-Martinez* opinion point in the opposite direction—to a regulatory or remedial character and purpose—and distinguish this case from that one.

b. One of the tests for determining whether sanctions are penal referred to in *Mendoza-Martinez* is whether the particular sanction “has historically been regarded as a punishment” (372 U.S. at 168). The importance of this criterion is underscored by the exhaustive examination the Court made of the legislative history of the denationalization statute to determine the attitudes of its sponsors in this regard (*id.* at 170-184). No such historical inquiry is needed to show that the sanction involved here is unlike the sanction of deprivation of citizenship involved there.

It is a matter of common knowledge, judicially known to the Court, that service in the Armed Forces of the United States has never been deemed punitive in character. Whether volunteered or conscripted, such service has always been viewed as an honor and a privilege, or at least an accepted duty of citizenship,

trant has under the regulations to secure the removal of delinquency status (see *infra*, pp. 52-55), retribution clearly cannot be ascribed as a goal of the regulations. Cf. *Anderson v. Hershhey*, 410 F. 2d 492, 498, n. 16 (C.A. 6), pending on petition for a writ of certiorari, No. 449, this Term. On the other hand, it can hardly be doubted that the sanction is intended to deter draft-related delinquent behavior (see *infra*, pp. 46-52).

never as punitive or degrading. *Selective Draft Law Cases*, 245 U.S. 366, 378, 390; *Anderson v. Hershey*, 410 F. 2d 492, 498-499 (C.A. 6), pending on petition for a writ of certiorari No. 449, this Term; *Oestereich v. Selective Service System Local Board No. 11*, 390 F. 2d 100 (C.A. 10), reversed on other grounds, 393 U.S. 233; *United States v. Capson*, 347 F. 2d 959, 962 (C.A. 10), certiorari denied, 382 U.S. 911. As the court noted in *Anderson v. Hershey, supra* (distinguishing *Mendoza-Martinez*), "induction has not historically been regarded as punishment" (410 F. 2d at 498). Persons with military records have traditionally pointed to their service with pride, and military service normally entitles an individual to a variety of veterans' benefits under both State and federal law. Honorably discharged veterans both of World War II and of the Korean conflict who had served in active status for a year or longer were granted full presidential pardons for all violations of federal law (except the laws for the government of the Armed Forces) whereof they had been convicted prior to their induction. Proclamation No. 2676 of December 24, 1945 (60 Stat. 1335); Proclamation No. 3000 of December 24, 1952 (67 Stat. c23). The idea that service is an honor is so prevalent in our thinking that Congress felt obliged to provide specifically in the Selective Service Act that conviction of a minor criminal offense is not a bar to service (50 U.S.C. App. 456(m)). Such burdens and hardships as accompany military service have always been regarded as unavoidable incidents of the "supreme and noble duty of contributing to the defense of the rights and honor of the na-

tion" (*Selective Draft Law Cases*, *supra*, 245 U.S. at 390), never as stigmatizing. In short, there is a clear contrast between induction into the Armed Forces and the punitive sanction of denationalization involved in the *Mendoza-Martinez* case.

Nor are these considerations affected by the fact that the delinquent's induction is *accelerated*—whether the registrant involved is already classified I-A or was reclassified into that category. Given the burdensome character of conscripted service and the peril to life and limb to which the soldier may be subject, it is natural and inevitable that many who are called will wish to defer to the extent possible—and even avoid altogether—the commencement of their tour of duty. But the mere expedition of induction, notwithstanding the objective of deterrence which the threat thereof concededly serves, cannot convert what is creditable into a stigmatizing or degrading estate. As the Director of Selective Service, replying to an inquiry by Representative Stafford as to whether the draft should "be used for punitive purposes," observed:

When a man has violated the selective service law itself, the acceleration of his processing toward induction is not deemed to be "punitive". The law has placed the obligation to serve on virtually every man within the liable ages. Service is characterized in the law, properly, as a privilege and a duty.

* * * The acceleration of processing for one who has violated the selective service law is merely a means of giving him an early oppor-

tunity to comply with the law rather than to be prosecuted. * * * ²⁹

If conscripted service is an honor, neither the mere advancing of the date of its scheduled commencement, nor indeed the requirement of service on behalf of registrants who might otherwise not be called, can properly be regarded as punishment.

c. A second *Mendoza-Martinez* criterion of punitiveness is whether an alternative (i.e., non-penal) purpose to which the sanction "may rationally be connected is assignable for it"—and, if so, whether the sanction "appears excessive in relation to the alternative purpose" (372 U.S. at 168-169).³⁰ The calling

²⁹ Hearings before the Committee on Armed Services, House of Representatives, 89th Cong., 2d Sess., June 22, 23, 24, 28, 29, and 30, 1966, *Review of the Administration and Operation of the Selective Service System* [Doc. No. 75], 9903. The correspondence between General Hershey and Representative Stafford, so far as pertinent, appears in Appendix B, *infra*, pp. 79-83.

³⁰ Cf. *Flemming v. Nestor*, 363 U.S. 603, 611-621 (termination of deported alien's social security benefits if deportation was on any of stated grounds sustained as non-penal; suggested regulatory purpose, to minimize foreign disbursements under pertinent statute); *Helvering v. Mitchell*, 303 U.S. 391, 398-405 (deficiency assessment in amount of 50 percent of tax due for fraudulently understating same held remedial; suggested non-punitive purpose, to protect revenue and reimburse government for expenses of investigation). And see *De Veau v. Braisted*, 363 U.S. 144 (statutory disqualification of persons convicted of felony from holding office in waterfront labor organizations held validly regulatory); *Rex Trailer Co. v. United States*, 350 U.S. 148 (imposition of fixed sum as "liquidated damages," in addition to fine, for defrauding government sustained as remedial); *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 548-552 (same; double damages plus \$2,000 forfeiture, recoverable in civil *qui tam* action).

of delinquents to duty before other I-A registrants has at least two valid non-punitive purposes—as does the reclassification as delinquents of other registrants not classified I-A who violate the Act or the regulations.

i. The fundamental purpose of the priority induction sanction specifically involved here—as indeed of the delinquency regulations generally—is to induce cooperation with the Selective Service System on the part of all draft-eligible young men. The objective, otherwise stated, is to discourage non-compliance with duty by those who might be disposed to shirk their obligations—by confronting them with an alternative prospect which, while honorable, is unpleasant enough to most registrants to serve as an effective deterrent, yet falls decisively short of the Act's ultimate sanction, the provision for conventional punishment. That prospect is a change in status, sometimes accompanied by reclassification, which results in accelerated induction—a speedier call to duty than the registrant might normally anticipate.³¹

The sanction in issue—application of the delinquency procedures—it should be emphasized, is ordinarily a device for dealing with relatively minor breaches of duty. The ultimate dereliction of duty, refusal to report for or submit to induction when ordered, can be dealt with only penally. Compelled induction would obviously be ineffectual where the

³¹ Different considerations of course might come into play where a registrant is in an exempt status, such as was the situation in *Oestereich*, for there, but for his delinquency, the registrant might never be subject to call at all (see *supra* p. 37-38).

very dereliction involved is refusal to serve at all (cf. 32 C.F.R. 1642.4(a)). But without such devices as reclassification, where necessary, and priority induction for dealing with less serious deviations from duty, the effectiveness of the Selective Service System's functioning would be significantly impaired.

If the *sole* permissible way of dealing with those less grave breaches of duty for which the delinquency regulations were fashioned—failure to return one's classification questionnaire, failure to report a change in eligibility status, failure to keep the board advised of one's mailing address, refusal to carry one's draft cards, failure to report for an ordered physical examination, and the like (see *supra*, pp. 18-19)—were the commencement of a criminal prosecution, the System might well falter in its attempt to discharge the difficult and delicate task it is called upon to perform under the Act. The Selective Service System, as much perhaps as our tax system, depends for its efficient operation on the voluntary cooperation of those subject to it. Particularly when the country is engaged in as divisive and frustrating a conflict as our engagement in Vietnam has proved to be, when the national objective is as limited as it is in this encounter, and when, precisely as a consequence of the conflict's limited goals, the difficult issue from a Selective Service standpoint is who shall be required to serve when not all must (see also *infra*, pp. 57-58), the number—actual and prospective—of such relatively minor derelictions becomes too great for the Act's penal clause alone to provide a fully adequate deterrent—or one whose enforcement is, as a matter of policy, desirable.

The dimensions of the problem are suggested by the substantial numbers of delinquents reported by the Nation's draft boards as popular discontent with our Vietnam commitment has increased. The significance of the volume of delinquents^{CLEU} lies not alone in their numbers but equally in the ominously rising curve which they trace. As of June 30, 1966, local board files listed a total of 13,631 "delinquents" among I-A and I-A-O registrants alone.³² After dipping briefly, and slightly, to 13,627 as of June 30, 1967,³³ the reported corresponding figure for subsequent reporting dates has risen as follows:³⁴

As of December 31, 1967-----	16,935
As of June 30, 1968-----	22,103
As of December 31, 1968-----	23,658

These figures refer, of course, to all types of delinquency, including failures to report for or submit to induction (as to which prosecution is the only possible sanction) as well as those less serious neglects of duty for which reclassification and accelerated induction may be effective alternative deterrents. While there is no readily available breakdown of the figures into the two categories of delinquency mentioned, we are informed by Selective Service officials that, based on

³² Annual Report, Director of Selective Service, Fiscal Year 1966, pp. 64, 66.

³³ Annual Report, Director of Selective Service, Fiscal Year 1967, pp. 66, 68.

³⁴ Semi-Annual Reports, Director of Selective Service: Period July 1 to December 31, 1967, pp. 30, 32; Period January 1 to June 30, 1968, pp. 36, 38; Period July 1 to December 31, 1968, pp. 32, 34.

their experience, a substantial majority of these totals have been delinquencies of the less serious sort.³⁵

A similar story is told by a related group of statistics. Whereas during the fiscal year 1961 a total of 16,988 cases of reported delinquency of all types were considered sufficiently serious to be referred to the Department of Justice for investigation, by fiscal 1966 this number had risen to 26,830, by 1967 to 29,128, by 1968 to 29,485, and during the first half of fiscal year 1969 alone to 15,772.³⁶ As youthful resistance to the draft and to our Vietnam undertaking has increased, the corresponding figures in both categories of statistics are almost certainly higher now.³⁷ If the government's sole means of coping with the situation were the institution of ordinary criminal proceedings in a sufficiently large number of cases to make significant inroads on the delinquency rate through the normal operation of the deterrent factor, it seems apparent that the already crowded criminal calendars of our federal courts would have little room for anything else.

³⁵ The most common of these have apparently involved failure to file current information questionnaires, failure to notify local boards of address changes, and failure to report for scheduled physical examinations.

³⁶ Annual Reports, Director of Selective Service: Fiscal Year 1961, p. 18; Fiscal Year 1966, p. 22; Fiscal Year 1967, p. 27. Semi-Annual Reports: Period January 1 to June 30, 1968, p. 15; Period July 1 to December 31, 1968, p. 10.

³⁷ The mass turn-ins of draft cards which have occurred from time to time in recent years, culminating in the nationwide "Stop the Draft" demonstrations of October 1967 (cf. *supra*, p. 4), suggest the substantiality of that statistic alone.

The delinquency regulations attempt a solution to this problem. Under them, use of the Act's criminal sanction is reserved for those "hard core" intransigents who commit the ultimate delinquency of refusal to submit to induction. Delinquencies less serious in nature are dealt with through what in effect is a civilly coercive device. The reclassification and priority induction sanctions arm the Selective Service System with a club, as it were, by which defiant as well as merely negligent registrants are *constrained* to comply with their duties—or face a distasteful albeit honorable alternative. Through the issuance of a delinquency notice to a registrant who it has evidence is in default as regards an obligation, the System first seeks, in as many instances as possible, to effect a return to compliance with the law—correction of the oversight if there was negligence merely, expunging should willfulness appear.³⁸ Should this fail, an effort is made to make soldiers rather than defendants of

³⁸ On occasion it may happen that the registrant recipient of a delinquency notice has committed no breach of duty at all—that the board was simply mistaken in declaring him delinquent. In that event the notice serves the alternative function of initiating exploration of the basis of the board's misunderstanding and the ironing out of whatever the difficulty has been. Viewed in this aspect, the delinquency notice is the equivalent of a show-cause order, directing the registrant to show cause why he should *not* be processed as a delinquent. In the instant case, the local board had solid evidence that petitioner had dispossessed himself of his draft cards—including, apparently, the documents themselves, which appear to have been turned over to the Selective Service authorities shortly after petitioner had discarded them on the steps of the federal building in Minneapolis during the "Stop the Draft Week" demonstration (A. 39; see *supra*, p. 4).

those who persist in their delinquency by ordering them to report for induction.³⁹ Only in the case of those delinquents, hopefully few in number, who, resisting the induction directive as well, exhibit the final defiance of refusal to serve when ordered, is the Act's ultimate sanction—criminal prosecution—invoked. Cf. Selective Service System, *Legal Aspects of Selective Service*, pp. 46-47 (1969 rev.):

Selective Service Regulations are designed to delay the prosecution of a violator of the law until after he has failed to report for or refused to submit to induction or assigned civilian work. This is to prevent, wherever possible, prosecutions for minor infractions of rules during his selective service processing, thereby reducing the number of cases that reach the courts and also giving the registrant, before being prosecuted, an opportunity to report for service in the armed forces. Since the purpose of the law is to provide men for the military establishment rather than for the penitentiaries, it would seem that when a regis-

³⁹ The election by the System to order the delinquent inducted rather than to press for prosecution for the delinquency can work to the registrant's advantage. If the delinquent reports for induction as ordered but fails to pass his physical examination or he is otherwise unacceptable to the Armed Forces, he escapes both the Army and the penitentiary. If the delinquent reports for induction as ordered but is rejected for service at the induction center, it is the invariable practice not to prosecute him for the violation of the regulations for which he was declared delinquent. It is to be noted that petitioner, by refusing to submit to medical examination at the induction station (see *supra*, p. 6, and *infra*, pp. 71-73), did not give the Army the opportunity to reject him for physical or related reasons. He thus forfeited the possibility of profiting from the practice to which we have referred.

trant is willing to be inducted, he should not be prosecuted for minor offenses committed during his processing. The result of this procedure is that the great majority of prosecutions involve the failure to report for or refusal to submit to induction or assigned civilian work.

So viewed, the delinquency regulations give to local boards a sanction not unlike the judicial power of civil contempt. Cf. *Shillitani v. United States*, 384 U.S. 364, 368-372; *Penfield Co. v. Securities & Exchange Commission*, 330 U.S. 585, 590; *United States v. United Mine Workers*, 330 U.S. 258, 300 n. 73, 305; *Lamb v. Cramer*, 285 U.S. 217, 221; *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 441-442.

It may be objected that the civil contempt analogy is unpersuasive because under 32 C.F.R. 1642.4(c) it is discretionary with the local board whether to remove from delinquency status a registrant who desires to correct his failure, whereas the respondent in a civil contempt proceeding is able to avoid the coercive sanction by obeying the court's order.⁴⁰ But the answer to that point is that, while the applicable regulation on its face does indeed make removal from delinquency status discretionary, a fair reading of the regulation in the context of the regulations as a whole suggests that, at least up to the time of the issuance of the order to report for priority induction, it

⁴⁰ As a consequence of their power to avoid the sanction through submission, civil contempt respondents as to whom the sanction invoked is confinement are said to "carry 'the keys of their prison in their own pockets'" (*Shillitani v. United States*, *supra*, 384 U.S. at 368, quoting from *In re Nevitt*, 117 Fed. 448, 461 (C.A. 8)). See also *Gompers v. Bucks Stove & Range Co.*, *supra*, 221 U.S. at 442.

would be an abuse of discretion for a board to refuse removal in the case of a registrant who sought in good faith to correct his breach of duty. The regulation provides, for example, that the delinquent may be removed from that status "at any time." Another regulation provides that where a registrant has been classified or reclassified as a delinquent (*i.e.*, reclassified I-A or I-A-O in consequence of his delinquency), the classification may be reopened at any time before induction, notwithstanding the restrictions on reopening which the regulations otherwise impose (32 C.F.R. 1642.14(b)).⁴¹ And it seems clear from the regulatory scheme as a whole, as previously suggested (note 25, *supra*), that the central objective of the delinquency regulations is to encourage the prompt correction of inadvertent delinquencies and the purging of those that may have been willful. It appears implicit, in short, in the regulations viewed as an entirety that at least prior to the issuance of an induction order the board not only may but *should* permit even a willful delinquent, if he in good faith seeks to bring himself into compliance, to escape the sanction.⁴² Thus, the civil contempt analogy becomes

⁴¹ See note 13, *supra*, for the terms of the otherwise applicable restrictions on reopening.

⁴² Whether the desire to comply and the promise to abide by his duties in the future are in good faith would of course be a matter of judgment as to which the area of discretion would be large. If, for example, the delinquency were the registrant's second, a prior delinquency having been removed by the board pursuant to the registrant's offer to comply with his neglected duty, it would clearly be an appropriate exercise of discretion for the board to reject a new offer to purge and to order the registrant inducted as a delinquent.

apt if, as suggested, it would be an abuse of discretion for a board to refuse to remove a registrant from delinquent status upon his indication of willingness to comply with the duty whose breach had occasioned the delinquency declaration.⁴³

There are respects, to be sure, in which the civil contempt analogy is imperfect. The contempt procedure, for example, is tailored to the enforcement of

⁴³ Once an order to report for induction has been issued, however, it is probably too late for the delinquent registrant to escape the consequences of his delinquency as a matter of right. It is too late then, that is to say, for a delinquent who would make amends to do other than invoke the board's discretion to relieve him of the duty to submit to induction. There can be no doubt as to the power of the board, even at that late hour, to relieve the registrant from the duty of compliance upon a proper indication of his desire to terminate his recalcitrance. 32 C.F.R. 1642.4(c) expressly provides, as noted previously, that removal from delinquent status may be effected *at any time*. Once an induction order has been issued, however, there is manifestly less basis for suggesting that a board would abuse its discretion by declining to exercise its authority to remove than in the situation where no induction order had as yet been given. Nevertheless, should this Court be of the view that the civil contempt analogy is sound, but that for the regulations to pass constitutional muster a registrant must have it within his power at any time up to the point of scheduled induction to effect removal of his delinquency (and with it rescission of the induction order predicated thereon) by purging his contumacy and complying with the duty he has breached, the Court could of course sustain the regulations subject to that constitutional emendation. Similarly, the Court can and has, even in the absence of separability clauses, upheld the basic provisions of statutes while voiding particular clauses as constitutionally offensive. See *United States v. Jackson*, 390 U.S. 570, 585-591; *Champlin Refining Co. v. Commission*, 286 U.S. 210, 234; cf. *Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 165 (Mr. Justice Frankfurter, concurring).

specific court orders—orders, moreover, which are appealable—not, as here, general duties imposed by generally applicable regulations. Again, whereas the incarcerated contempt respondent can terminate his confinement whenever he chooses, simply by deciding to obey the court's directive (cf. *Shillitani v. United States*, *supra*, 384 U.S. at 371; *Maggio v. Zeitz*, 333 U.S. 56, 76), a registrant who has been actually inducted under a delinquency induction order cannot secure his release from military discipline by deciding then to purge his delinquency; actual induction, under any hypothesis, marks the terminal point of his *locus poenitentiae*. Counterweighing the latter consideration, on the other hand, induction into the Armed Forces, unlike the coercive confinement to which the civil contemnor is liable, is an honorable status, as noted earlier, carrying no element of the stigma with which incarceration has always been associated. Such differences in the two procedures, however, serve merely to remind that it is an analogy, and no more, that is involved. The suggested analogy is a helpful one, though, and provides persuasive support for our contention that the delinquency procedures, both in conception and practical impact, are basically coercive and non-punitive in nature. And precisely for that reason, provided “the usual due process requirements are met,” the “safeguards of indictment and jury” can constitutionally be dispensed with. *Shillitani v. United States*, *supra*, 384 U.S. at 371.”

“In *Oestereich v. Selective Service Bd.*, 393 U.S. 233, the petitioner conceded—indeed affirmatively urged—that “delinquency, properly viewed, is analogous to civil contempt” (Pet. Br., No. 46, 1968 Term, p. 52). He contended—as did the gov-

There is but one respect that occurs to us in which it is necessary to qualify the foregoing discussion. In some situations a local board could, without abuse of discretion, reject a registrant's attempt to correct his violation of duty and decline to remove him from delinquent status notwithstanding his promise, however sincere, to abide by his duties in the future. If, for example, through fraud, failure to keep the local board advised of relevant changes in status, or other breach of duty, the registrant had succeeded in

ernment in that case and as hereinabove urged again—that the delinquency procedures prescribed by the regulations are “designed not to punish for past acts, but to coerce compliance with the procedures of the system leading up to induction” (*ibid.*). The sole respect in which Oestereich and the government differed on this point was as to the *scope* of the “procedures” with which the regulations seek to exact compliance. Oestereich argued that the delinquency regulations, properly viewed, are limited to compelling registrants to supply their local boards with the information needed in the “classification process,” and that the duty of registrants to keep their draft cards in their possession is “unrelated to” that process (*id.* at 52, 55). In the instant case petitioner adopts the same position as an *alternative* argument. He renews Oestereich's claim that possession of the registration certificate is unrelated to the classification process and extends the argument to include possession of the classification notice (Pet. Br. 63-66). However, as noted in the government's preliminary memorandum in the *Oestereich* case (p. 8), registration is a necessary preliminary step to classification and induction, and the requirement of possession of one's registration certificate is calculated to make the entire system operate more effectively. That observation has, of course, equal if not greater applicability to the requirement of possession of one's classification certificate. See *United States v. O'Brien*, 391 U.S. 367, 378-381; and see *infra*, pp. 65-67. The limitation suggested by Oestereich and petitioner on the scope of the delinquency regulations is therefore unsound.

escaping a call to military service that would normally have been forthcoming, or had otherwise received a benefit under the Act to which he had not been entitled (cf. *United States v. Eisdorfer*, 299 F. Supp. 975 (E.D.N.Y.), pending on direct appeal, No. 330, this Term), the board could properly reject an offer to purge and decline to remove the delinquency. This would be particularly true where the registrant had in the meantime acquired a new status under the Act, on which an otherwise valid claim to deferment could be based, with the consequence that the promise to comply with future duties could safely be made without substantial risk of later induction. The issuance of an induction order to one so situated could properly be viewed as remedial—prevention of the registrant's profiting from his wrong. Cf. *Costello v. United States*, 365 U.S. 265; *Chaunt v. United States*, 364 U.S. 350. Since, however, neither the present case, the companion *Breen* case, nor the *Stewart* case, pending on direct appeal, No. 637, involves a situation of the type mentioned, further discussion of the applicable principles would appear unnecessary at this time.

ii. A second non-punitive purpose served by the delinquency regulations is the maintenance of *non*-delinquent registrants' morale. As pointed out earlier, it would not be feasible for the government to prosecute criminally every breach of duty under the Act and regulations, however relatively minor the violation. It would be out of the question, in other words, for every refusal of cooperation with the system, every manifested defiance, to be dealt with effectively through the ordinary criminal process. This being so,

some such device as that prescribed by the delinquency regulations is needed to foster the morale of those millions of registrants who strive in good faith to comply with their duties. Particularly during a period when, as now, the great problem is who should be required to serve when not all are needed—whether college students should be deferred and if so which categories and for how long, whether younger men or older men in the eligible age group should be taken first, whether marital status should be a relevant consideration and if so what its relative importance should be *vis-à-vis* other bases for deferment, and the like⁴⁵—a factor which indubitably tends to bolster the morale of those upon whom the unwelcome obligation falls is the knowledge that those registrants who shirk their responsibilities and refuse to cooperate with the system at least do not profit from their delinquency. The realization that those who refuse such compliance are required under the law to “go first” helps ease the burden of compliance for those who, at whatever hardship, discharge their responsibilities under the Act and the regulations.⁴⁶

⁴⁵ The central nature of the problem of priorities is aptly epitomized in the title of the 1967 Report of the President's National Advisory Commission on Selective Service—*In Pursuit of Equity: Who Serves When Not All Serve*.

⁴⁶ That maintenance of morale can be a legitimate regulatory purpose of legislation was implicitly recognized by this Court, in a not dissimilar context, in *Kennedy v. Mendoza-Martinez*, *supra*. The dissenters in that case would have sustained the denationalization statute there in issue on precisely the ground that it represented a reasonable effort by Congress to sustain the morale of those millions of soldiers and civilians who did not flee from or remain without their country for the purpose

d. We earlier noted that one of the purposes of the delinquency regulations is admittedly to deter non-compliance with duty by those disposed to shirk their Selective Service obligations by confronting them with the unwelcome alternative of a speedier summons to service than they might normally expect. It does not follow, as petitioner urges (Pet. Br. 46), that the punitive character of the sanction is thereby demonstrated. That a purpose, even an important purpose, of a prescribed sanction is to discourage unlawful or unacceptable conduct is not inconsistent with the sanction's basically regulatory or remedial character. Many indisputably non-punitive sanctions have deterrence as a principal if not *the* principal end. Employment of the civil contempt sanction, whose objective is to coerce, not to punish, nonetheless tends to deter acts defiant or violative of court orders. Disbarment is another typically remedial sanction in which the deterrent factor looms large. Disbarment "is not for the purpose of punishment, but for the purpose of preserving the courts of justice from the official minis-

of avoiding their military obligations (372 U.S. at 209-210 (Justices Stewart and White); *id.* at 197 (Justices Harlan and Clark, concurring as to this point)). The majority alluded to the morale factor and impliedly recognized it as a legitimate non-punitive purpose, but concluded from an examination of the legislative history that in fact no such objective had motivated the provision's enactment (*id.* at 182). Cf. *Trop v. Dulles*, 356 U.S. 86, 122 (Justices Frankfurter, Burton, Clark, and Harlan, dissenting) (sustenance of troop morale a legitimate non-penal purpose of a statute providing for loss of nationality for desertion). In the instant case, where regulations, not a statute, create the sanction, there is of course no "legislative history" to examine to determine the motivation for the pertinent provisions.

tration of persons unfit to practise in them" (*Ex parte Wall*, 107 U.S. 265, 288). Yet who can doubt the deterrent effect of this most drastic of remedial devices on attorney misconduct? Cf. *Sacher v. Association of the Bar*, 347 U.S. 388; *In re Isserman*, 345 U.S. 286; *In re Osborn*, 376 F. 2d 808 (C.A. 6).

Similarly, deportation, another familiar regulatory device, "is [not] * * * punishment; it is simply a refusal by the Government to harbor persons whom it does not want." *Bugajewitz v. Adams*, 228 U.S. 585, 591; cf. *Woodby v. Immigration and Naturalization Service*, 385 U.S. 276, 285; *Galvan v. Press*, 347 U.S. 522, 531; *Harisiades v. Shaughnessy*, 342 U.S. 580, 594-595; *Mahler v. Eby*, 264 U.S. 32, 39. Yet the deterrent effect is obvious in a sanction that may be "the equivalent of banishment or exile" (*Fong Haw Tan v. Phelan*, 333 U.S. 6, 10) and may involve the "loss * * * of all that makes life worth living" (*Ng Fung Ho v. White*, 259 U.S. 276, 284). At least it is so with respect to the 14 (of 18) grounds of deportation which are for post-entry *conduct*, much of it criminal in nature (8 U.S.C. 1251(a)(4)-(9), (11)-(18)). Other civil sanctions similarly have a demonstrably deterrent effect on the forms of behavior with which they are concerned—for example, license revocation" (of which disbarment and deportation are of course but particular types, cf. *Helvering v. Mitchell*, 303

⁴⁷ Cf. *Milwaukee Publishing Co. v. Burleson*, 255 U.S. 407 (second-class mail privilege); *Barsky v. Board of Regents*, 347 U.S. 442 (practice of medicine); *Hawker v. New York*, 170 U.S. 189 (same).

U.S. 391, 399 n. 2), denials of licenses or privileges,⁴⁸ postal fraud orders,⁴⁹ nuisance abatement,⁵⁰ and civil forfeitures and penalties of various kinds.⁵¹ Many other such examples might be cited. Cf. Davis, *Administrative Law*, Sec. 19 (1951); Chamberlain, Downing and Hays, *The Judicial Function in Federal Administrative Agencies*, ch. III, 79-163 (1942). Those mentioned will suffice, however, to show that it does not at all follow from the fact that a sanction has a deterrent purpose and impact that it is necessarily punitive in a constitutional sense. Much of the work of administrative agencies, as the last-cited treatises indicate, is concerned with the administration of just such sanctions.

⁴⁸ Cf. *De Veau v. Braisted*, 363 U.S. 144 (denial to persons convicted of crime of right to hold office in waterfront organizations); *Garner v. Los Angeles Board*, 341 U.S. 716 (denial of privilege of public employment to persons who have engaged in subversive activity); *Adler v. Board of Education*, 342 U.S. 485 (same); *Beilan v. Board of Education*, 357 U.S. 399 (same).

⁴⁹ Cf. *Public Clearing House v. Coyne*, 194 U.S. 497; *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94.

⁵⁰ Cf. *La-ton v. Steele*, 152 U.S. 133.

⁵¹ Cf. *Rez Trailer Co. v. United States*, 350 U.S. 148 (liquidated damages in amount of statutorily fixed sum for defrauding government); *Helvering v. Mitchell*, 303 U.S. 391, 398-405 (50 percent deficiency assessment for fraudulently understating tax due); *Hepner v. United States*, 213 U.S. 103 (monetary forfeiture for inducing alien to migrate to United States to perform labor); *Lloyd Sabaudo Societa v. Elting*, 287 U.S. 329 (money penalty against steamship company for bringing inadmissible alien to United States); *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320 (same).

3. The delinquency regulations are not invalid for failure to provide procedural due process

Petitioner argues that the delinquency regulations, even if they do not impose punishment, are invalid for failure to provide procedural due process (Pet. Br. 49-51). There is no substance to that claim. The twin minimum essentials of due process, notice and hearing, are amply provided for. The provision for notice is express (32 C.F.R. 1642.4(b)). While there is no explicit provision for a hearing, the regulations plainly contemplate that the recipient of a delinquency notice who desires a hearing will be given one. The delinquency notice form (SSS Form No. 304) informs the registrant of the fact that he has been declared delinquent; specifies the duty or duties for breach of which the declaration was made; directs the registrant to report to his board immediately (or take the notice to the board nearest him) for advice as to what he should do; informs him of the criminal consequences of "willful" failure to perform the duty in question; and warns him of the possibility that he may be classified I-A as a delinquent and ordered to report for induction (A. 44; *supra*, p. 20). The clear implication of these instructions and warnings, read in the light of the provision of 32 C.F.R. 1642.4 (c) that a declared delinquent "may be removed from that status by the local board at any time," is that the registrant will be heard on the charges, if he desires to be, before significant substantive action is taken—before, that is, he is reclassified I-A (if he is not already in that class) or an order for expedited induction is issued.

It is true that the regulations are silent as to the incidents of such a hearing should the registrant indicate he desires one.⁵² There is no occasion here, however, to consider what the minimum essentials required by the Constitution might be for such a hearing in the event one were sought. For petitioner, who took no action whatever in response to his delinquency notice, plainly lacks standing to raise such issues in this case. It will be time enough to consider the *type* of hearing required by due process when a registrant who seeks such a hearing is denied one, or as full a one as he believes he is entitled to. In petitioner's posture, such questions as whether the registrant at such a hearing has a right to "confrontation and cross-examination," "public trial," "compulsory process," and "proof beyond a reasonable doubt" (Pet. Br. 50) are wholly theoretical.

By the same token, petitioner's implied suggestion that the order directing him to report for induction followed too soon after the service of the delinquency notice (Pet. Br. 5, 64) is also without merit. The induction order was issued five days after the mailing of the delinquency notice (*supra*, p. 5). In the absence of any indication that petitioner wished a hearing—he does not even now make such a representa-

⁵² Depending upon what the situation might be, the recipient of such a notice, as previously indicated, might wish to deny that he had been delinquent and to be confronted with the evidence of the claimed defalcation. Or he might wish to acknowledge the delinquency and take such steps as might be necessary to clear up his default and effect the removal of this status (see *supra*, pp. 50-54, incl. N. 38).

tion—he is obviously in no position to complain that he was prejudiced by the brevity of the interval.

4. The delinquency regulations are not unconstitutionally vague or overbroad

Petitioner's contention that the delinquency regulations are impermissibly vague and overbroad (Pet. Br. 35-43) is also without merit. The regulations authorize reclassification and acceleration of the induction of a registrant who "has failed to perform any duty or duties required of him under the selective service law * * *" (32 C.F.R. 1642.4(a)). This language thus simply incorporates the provisions of the Selective Service Act and regulations imposing certain duties on registrants, and petitioner has not shown that any of these provisions is unacceptably vague. In particular, the duty involved in this case—the obligation to carry a registration and a classification card at all times (32 C.F.R. 1617.1, 1623.5)—is specific and narrowly defined.

Petitioner argues, however, that the regulations must fail for vagueness because they give to the local boards unbounded discretion whether and under what circumstances to declare a registrant delinquent, and leave them similarly unguided as to when and whether a declared delinquency shall be removed (Pet. Br. 7-8, 35-37). This contention is likewise unsound. Clearly the discretion which a board possesses whether to *issue* a declaration of delinquency presents no constitutional problem. That discretion is in every respect comparable to that of a prosecuting attorney whether to institute criminal proceedings under the Act for a devia-

tion by a registrant from duty (by definition an offense)—or indeed whether to prosecute for any offense under any statute. It has never been supposed that the existence of such prosecutorial discretion presents a sound objection to the enforcement of the criminal law. The perhaps more serious objection, cf. *United States v. Eisdorfer*, *supra*, 299 F. Supp. at 988-989, that a board has unfettered discretion whether and under what circumstances to rescind a declared delinquency, is obviated by acknowledging (see *supra*, pp. 52-54) that it would be an abuse of discretion for a board to refuse removal from that status where the registrant makes a good faith and timely effort to clear up his delinquency and return to compliance with his duties. Where the registrant has it within his power to effect the removal of his delinquency through purging and giving satisfactory assurances of non-repetition, the argument based on the assumed guidelinelessness of board discretion ceases to have force.

5. *As applied to the duty of registrants to maintain possession of their draft cards, the delinquency regulations do not infringe First Amendment liberties*

Nor is there merit to petitioner's claim that, as applied to the duty of registrants to maintain their draft cards in their possession, the delinquency regulations conflict with the protections of the First Amendment (Pet. Br. 51-58). That issue was settled in substance by *United States v. O'Brien*, 391 U.S. 367, 377-381. Petitioner's claim that he had a right to "turn in" his draft cards as a gesture of political protest differs in no essential way from O'Brien's claim that he had a right to burn his draft certificates as a similar act of

"symbolic speech." That claim was rejected in *O'Brien* (391 U.S. at 376-377, 381-382). It is immaterial that *O'Brien* involved the destruction of certificates, not merely their non-possession, since it is apparent that a certificate which a registrant discards or abandons, as in this case, is as useless to him and the Selective Service System as if he burned or otherwise destroyed it.

The *O'Brien* opinion lists (*id.* at 378-380) some of the significant purposes served by the certificates. To them might be added another, suggested by recurrent reports of deliberate destruction of draft board files and records by persons "protesting" against conscription and the Vietnam conflict.⁵³ Where a board's files are lost or destroyed, whether through design or natural disaster, previously issued registration and classification cards might well be useful to the board in reconstructing its files—provided they have been retained by registrants in accordance with the requirement of the regulations. Cf. *United States v. Miller*, 367 F. 2d 72, 81 (C.A. 2), certiorari denied, 386 U.S. 911. A destroyed or discarded certificate would obviously be useless for this purpose. At all events, petitioner was not prosecuted for dispossessing himself of his draft cards, but rather for refusing to submit to induction.

Petitioner's real quarrel, it is apparent (see Pet. Br. 51-54), is not with the regulations, but with

⁵³ *E.g.*, New York Times, May 18, 1968, p. 36 (Baltimore); *id.*, September 25, 1968, p. 5 (Milwaukee); *id.*, May 26, 1969, p. 8 (Chicago); Washington Post, May 22, 1969, p. D1 (Silver Spring, Maryland).

General Hershey's recommendations, specifically his letter of October 26, 1967, in which he gave an expansive interpretation to the regulations as authorizing delinquency reclassification for illegal activity *in general* which "interferes with recruiting" or "causes refusal of duty" in the Armed Forces (Pet. Br. App. 18-20). There is no occasion in this case, however, to explore the propriety or ramifications of that interpretation. Cf. *National Student Ass'n v. Hershey*, 412 F.2d 1103 (C.A.D.C.). For the trial judge in this case, in his fact-finding capacity at the juryless trial, found that petitioner had been declared delinquent and ordered to report for induction, not by reason of General Hershey's letter, but solely because of his non-possession of his draft cards, in violation of the regulations (*supra*, pp. 7-8).⁵⁴

⁵⁴ Petitioner acknowledges that his suggestion that the board's action in this case was "premised upon the Hershey directive" is conjectural, based on the fact that the induction order followed "so closely * * * upon [the directive's] distribution" (Pet. Br. 52). In point of fact, the induction order was issued some two months after the distribution of General Hershey's letter (*supra*, pp. 5, 6-7). It was sent, moreover, more than two weeks after the issuance by General Hershey and the then Attorney General of a joint statement making it abundantly clear that delinquency reclassification is permitted only when a registrant "violates any duty affecting his own status (for example, giving false information, failing to appear for examination, or failing to have a draft card," and that "[l]awful protest activities, whether directed to the draft or other national issues, do not subject registrants to acceleration [of induction] or any other special administrative action by the Selective Service System." See Joint Statement of December 9, 1967, reprinted in Appendix B to our brief in the companion *Breen* case, No. 65, this Term.

E. THE DECLARATION OF DELINQUENCY AND THE RESULTING INDUCTION ORDER WERE AUTHORIZED BY THE REGULATIONS THEMSELVES

There is no substance to petitioner's claim that the board's declaration of delinquency and order directing him to report for accelerated induction on the basis thereof were unauthorized by the delinquency regulations themselves (Pet. Br. 61-66).

1. Petitioner contends that non-possession by a registrant of his draft cards, viewed as a criminal offense, is punishable, if at all, under Section 12(b)(6) of the Act (50 U.S.C. App. 462(b)(6)),⁵⁵ not Section 12(a) (50 U.S.C. App. 462(a)).⁵⁶ He argues from that premise that "since possession is not a 'duty' under § 12(a), it is not a 'duty' under Part 1642 of the Regulations [*i.e.*, the delinquency provisions]" (Pet. Br. 61-62). That argument is without merit. 32 C.F.R. 1617.1 provides that every registrant "must" have his registration certificate in his possession at all times. 32 C.F.R. 1623.5 states that every classified registrant "must" have his classification notice in his possession

⁵⁵ That subsection provides: "(b) Any person * * * (6) who knowingly violates or evades any of the provisions of this title or rules and regulations promulgated pursuant thereto relating to the issuance, transfer, or possession of such certificate [*i.e.*, any certificate issued pursuant to the title or rules and regulations] shall [be punished by a fine of not more than \$10,000 or imprisoned for not more than five years, or both]."

⁵⁶ In pertinent part, that subsection provides: "(a) Any * * * person charged as herein provided with the duty of carrying out any of the provisions of this title, or the rules or regulations made * * * thereunder, who shall knowingly fail or neglect to perform such duty * * * shall [be punished by imprisonment for not more than five years or a fine of not more than \$10,000, or both]."

at all times. Each of these regulations creates a "duty", for failure to perform which, under 32 C.F.R. 1642.4(a), he may be declared delinquent by his local board.⁶⁷ It is immaterial whether, viewed as a penal matter, non-possession is punishable under Section 12(a) or Section 12(b)(6)—the penalty under each of which provisions, it may incidentally be noted, is identical. *Wolff v. Selective Service Local Board No. 16*, 372 F. 2d 817 (C.A. 2), the sole authority cited by petitioner for his suggestion that the question as to which penal clause is applicable is relevant (Pet. Br. 62), is in no way germane.⁶⁸

2. Petitioner alternatively argues that the only kind of "duty" under the regulations for failure to perform which a local board may declare a registrant delinquent is one that is "relevant to the classification process," or that constitutes "an integral part of the relationship between the registrant and the board," and that the regulations requiring registrants to carry their draft cards at all times do not impose a duty of either description (Pet. Br. 63-66).⁶⁹ Even

⁶⁷ Petitioner's suggestion that 32 C.F.R. 1617.1 and 1623.5 impose no duty because they "do not contain either the word 'duty' or the word 'shall'" (Pet. Br. 63; cf. Pet. Br. 43) is patently unsound. As noted, they both contain the word "must".

⁶⁸ What the *Wolff* court remarked was that "no regulation authorizes a draft board to declare a registrant a delinquent" for violating that part of Section 12(a) (50 U.S.C. App. 462(a)) which proscribes "knowingly hinder[ing] or interfer[ing] * * * with the administration of" the Act (372 F. 2d at 821)—a clause not relevant to the present discussion (see note 56, *supra*).

⁶⁹ Substantially the same argument was made by the petitioner in the *Oestereich* case, but there only in regard to the duty to retain registration certificates (see note 44, *supra*).

assuming that there is no rational relationship between the possession requirement and the classification and other functions of local boards (but see note 44, *supra*), it does not follow that the declaration of delinquency was unauthorized in this case, or is *ultra vires* generally.

The answer to petitioner's contention is that the regulations do not limit the duties whose breach constitutes delinquency to those that assist the boards in their classifying function or other specific responsibilities under the Act. The regulations make the failure to perform "any duty" required of registrants under the Selective Service law a basis for a determination of delinquency (32 C.F.R. 1602.4, 1642.4(a)). It is undisputed that the regulations require registrants to keep their draft cards in their possession at all times and that petitioner failed to comply with that duty. That made him a delinquent under the regulations and warranted the issuance of the accelerated induction order.⁶⁶

⁶⁶ Petitioner's contention that *Oestereich v. Selective Service Bd.*, 393 U.S. 233, directly governs this case (Pet. Br. 59-61) is also unsound. *Oestereich* involved the delinquency reclassification of a registrant who enjoyed exempt status under the Act. (see *supra*, pp. 29, 32, 37-38). The Court accordingly held that the board's action had been "basically lawless" (393 U.S. at 237). And the fact that Congress, in 1967, in effect "froze" the currently effective "order of call" provisions of the regulations into law by prohibiting the President from making any changes therein without specific statutory authority (Section 5(a)(2) (50 U.S.C. App. (Supp. IV) 455(a)(2)); see *supra*, pp. 36-37), in no way supports petitioner's position (see Pet. Br. 60). The congressional action related solely to the relative order of

II. THE GOVERNMENT ADEQUATELY ESTABLISHED THAT PETITIONER WILLFULLY FAILED TO SUBMIT TO INDUCTION

There is no substance to petitioner's contention that the government did not prove at the trial that he willfully failed to submit to induction (Pet. Br. 66-76). The proof was fatally defective, petitioner argues, because it failed to include a showing that he was given opportunity to take the ceremonial "one step forward" that symbolically marks the transition from civilian to military status (AR [Army Regulation] 601-270, paragraph 37a, quoted at Pet. Br. 68, n. 31a). The contention misconstrues what "submitting to induction" comprises. It is true that the taking of the "one step forward" marks the *culmination* of the induction process, but induction is just that—a process. Paragraph 13g of the cited Army Regulation defines "induction" as

[t]he *procedure* consisting of the *physical inspection* (or, if appropriate, the complete medical examination), *mental testing* (if not already accomplished), the completion of records and *necessary processing to complete the transition* from civilian to military status * * * [emphasis added].

It was precisely this "processing" to which petitioner refused to submit (*supra*, p. 6). Paragraph 37a itself, on which petitioner relies, provides that the "one step forward" ceremony be conducted only for those

induction as regards "age groups"; it in no way affected the powers with respect to delinquents. Quite to the contrary, those powers, as argued previously, were confirmed and ratified.

registrants "who have been determined to be fully qualified for induction * * *." Petitioner refused to take part in *any* of the processes, including physical and mental examinations, designed to test whether he was qualified for induction. It would hardly be appropriate to require induction center personnel to ask a registrant to take the ceremonial step forward when he had refused to submit to the very processes that are designed to test his acceptability to the Armed Forces.⁶¹ Petitioner's conviction for refusing to comply with the directive of his board that he submit to induction was therefore proper. Cf. *Williams v. United States*, 203 F. 2d 85, 87 (C.A. 9), certiorari denied, 345 U.S. 1003.

Chernekov v. United States, 219 F. 2d 721 (C.A. 9) relied on by petitioner (Pet. Br. 73-74), does not support his position. There a registrant who had, apparently, been *found qualified for service* refused in writing to be inducted, but was neither given the op-

⁶¹ This is particularly true where, as in petitioner's case, the registrant has not been given a pre-induction physical examination (delinquent registrants as well as volunteers are excepted from the requirement of such an examination, see 32 C.F.R., 1628.10, 1631.7(a) and (b)). Indeed, since petitioner, had he participated in the examination processes which normally precede induction, might have been rejected for service, a question would normally arise as to whether he had sufficiently exhausted his administrative remedies. See *Falbo v. United States*, 320 U.S. 549, 554; *Estep v. United States*, 327 U.S. 114, 123; *Gibson v. United States*, 329 U.S. 338, 343-350; cf. *McKart v. United States*, 395 U.S. 185, 202-203. Since, however, the government did not raise the exhaustion issue at trial—on the contrary, it conceded that petitioner had sufficiently pursued the administrative course (Tr. 71)—we do not seek to rely on that point now.

portunity to take the ceremonial step that traditionally marks acceptance of induction, *nor warned of the consequences* of his refusal to do so. The Ninth Circuit reversed his conviction on the ground that he had not been given the "last clear chance," contemplated by the Army regulations, to change his mind and accept induction rather than possible conviction for a felony (219 F. 2d at 725). The court indicated, however, that it would have reached the opposite result—as it had in fact done in an earlier case (*Bradley v. United States*, 218 F. 2d 657 (C.A. 9), reversed on other grounds, 348 U.S. 967)—had the registrant been warned of the consequences of his refusal (*ibid.*). Here the record shows that petitioner was amply warned of the criminal consequences of his refusal, and that he still declined to submit to any of the requisite processing (see *supra*, p. 6). In these circumstances, as the courts below properly concluded (A. 27-29, 34-35), petitioner was accorded all the opportunity to which he was entitled to comply with the order to submit to induction, but refused to cooperate in any respect.

III. THE INDICTMENT IS NOT DUPLICITOUS

There is no merit to petitioner's contention that the indictment should have been dismissed as duplicitous (Pet. Br. 77-81). The indictment charged a single offense—failure to comply with an order of the local board (A. 2). That the order required petitioner to do two things—report for and submit to induction—did not make the charge duplicitous. Cf. *Billings v. Truesdell*, 321 U.S. 542, 557, on which the court of

appeals properly relied (A. 34-35), where this Court stated: "The order of the local board to report for induction includes a command to submit to induction." And see *Estep v. United States*, 327 U.S. 114, 119. Analogously, a single conspiracy may have several objects. *Braverman v. United States*, 317 U.S. 49, 53-54. The undisputed evidence showed that petitioner reported at the induction station, thereby complying with that aspect of the directive, but willfully failed to submit to induction, thus violating the order viewed as a totality. There is no indication, nor indeed does it appear to be seriously suggested, that petitioner was in any way prejudiced in presenting his defense by the form in which the indictment was drawn. His claim in this regard is thus wholly lacking in substance.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX A

Section 1631.7 of the Selective Service regulations (32 C.F.R. 1631.7), not reprinted by petitioner, provides in pertinent part:

§ 1631.7 *Action by local board upon receipt of notice of call.*

(a) When a call is placed without designation of age group or groups, each local board, upon receiving a Notice of Call on Local Board (SSS Form No. 201) from the State Director of Selective Service (1) for a specified number of men to be delivered for induction, or (2) for a specified number of men in a medical, dental, or allied specialist category to be delivered for induction, shall select and order to report for induction the number of men required to fill the call from among its registrants who have been classified in Class I-A and Class I-A-O and have been found acceptable for service in the Armed Forces and to whom the local board has mailed a Statement of Acceptability (DD Form No. 62) at least 21 days before the date fixed for induction: *Provided*, That a registrant classified in Class I-A or Class I-A-O who is a delinquent may be selected and ordered to report for induction to fill an induction call notwithstanding the fact that he has not been found acceptable for service in the Armed Forces and has not been mailed a Statement of Acceptability (DD Form No. 62): *And provided further*, That a registrant classified in Class I-A or Class I-A-O who has volunteered for induction may be selected and ordered to report for induction notwithstanding the fact that he has not been found acceptable for service in the Armed Forces and regardless of whether or not a Statement of Acceptability

(DD Form No. 62) has been mailed to him. Such registrants, including those in a medical, dental, or allied specialist category, shall be selected and ordered to report for induction in the following order:

(1) Delinquents who have attained the age of 19 years in the order of their dates of birth with the oldest being selected first.

(2) Volunteers who have not attained the age of 26 years in the sequence in which they have volunteered for induction.

(3) Nonvolunteers who have attained the age of 19 years and who have no [sic] attained the age of 26 years and who (A) do not have a wife with whom they maintain a bona fide relationship in their homes, in the order of their dates of birth with the oldest being selected first, or (B) have a wife whom they married after the effective date of this amended subparagraph [August 26, 1965] and with whom they maintain a bona fide family relationship in their homes, in the order of their dates of birth with the oldest being selected first.

(4) Nonvolunteers who have attained the age of 19 years and have not attained the age of 26 years and who have a wife whom they married on or before the effective date of this amended subparagraph [August 26, 1965] and with whom they maintain a bona fide family relationship in their homes, in the order of their dates of birth with the oldest being selected first.

(5) Nonvolunteers who have attained the age of 26 years in the order of their dates of birth with the youngest being selected first.

(6) Nonvolunteers who have attained the age of 18 years and 6 months and who have not attained the age of 19 years in the order of their dates of birth with the oldest being selected first.

* * * * *

(b) When a call is placed with designation of age group or groups, each local board, upon

receiving a Notice of Call on Local Board (SSS Form 201) from the State Director of Selective Service for a specified number of men to be delivered for induction, shall select and order to report for induction the number of men required to fill the call from among its registrants who have been classified in Class I-A and Class I-A-O and who have been found acceptable for service in the Armed Forces and to whom the local board has mailed a Statement of Acceptability (DD Form 62) at least 21 days before the date fixed for induction; *Provided*, That a registrant classified in Class I-A or Class I-A-O who is delinquent may be selected and ordered to report for induction to fill an induction call notwithstanding the fact that he has not been found acceptable for service in the Armed Forces and has not been mailed a Statement of Acceptability (DD Form 62); *And provided further*, That a registrant classified in Class I-A or Class I-A-O who has volunteered for induction may be selected and ordered to report for induction notwithstanding the fact that he has not been found acceptable for service in the Armed Forces and regardless of whether a Statement of Acceptability (DD Form 62) has been mailed to him. Such registrants shall be selected and ordered to report for induction in the following order:

(1) Delinquents who have attained the age of 19 years in the order of their dates of birth with the oldest being selected first.

(2) Volunteers who have not attained the age of 26 years in the sequence in which they have volunteered for induction.

(3) Registrants in the designated age group; and registrants who previously have been deferred in Class I-S-C after attaining the age of 19 years, or who have requested and have been granted a deferment in Class II-S after the enactment of the Military Selective Service Act of 1967, and who are no longer deferred.

shall be considered as being within the age group called regardless of their actual age. These registrants shall be integrated and called according to the month and day of their birth, the oldest first. Registrants who have been deferred in Class I-S-C or Class II-S and have been integrated with a prime age group under the provisions of this paragraph shall, for the purposes of selection and call, thereafter be considered a member [*sic*] of such age group.

* * * * *

APPENDIX B

General Hershey's reply to Congressman Stafford's inquiries concerning the use of the draft for punitive purposes (Hearings before the Committee on Armed Services, House of Representatives, 89th Congress, Second Session, June 22, 23, 24, 28, 29 and 30, 1966, *Review of the Administration and Operation of the Selective Service System* [Doc. No. 75], pp. 9897-9904):

CORRESPONDENCE SUBMITTED BY HON. ROBERT
T. STAFFORD, REPRESENTATIVE FROM VERMONT

JULY 8, 1966.

Lt. Gen. LEWIS B. HERSHEY,
Director, Selective Service System,
Washington, D.C.

DEAR GENERAL HERSHEY: As you will recall, during Committee hearings on the operation and administration of the Selective Service System, I suggested that those members who have questions which remained unanswered have the opportunity of forwarding them to you in writing so as to enable you to provide them with a reply.

I am in receipt of certain of these communications from members of the Committee, including one from Congressman Robert T. Stafford dated June 27, 1966.

My purpose in writing you, therefore, is to reemphasize my understanding that you will provide these members with a written response to their interrogatories and furnish the Committee with a copy of the specific correspondence so that it may be made a part of the official record on these hearings.

Sincerely,

L. MENDEL RIVERS,
Chairman.

NATIONAL HEADQUARTERS,
SELECTIVE SERVICE SYSTEM,
OFFICE OF THE DIRECTOR,
Washington, D.C., July 13, 1966.

Hon. L. MENDEL RIVERS,
*Chairman, Committee on Armed Services,
House of Representatives.*

DEAR MR. CHAIRMAN: I have your letter of July 8, 1966, concerning questions which may be submitted by letter by members of the Committee in connection with the current posture hearings on Selective Service.

I have received a letter from Congressman Robert T. Stafford listing a number of questions. I have acknowledged his letter, and written replies to his questions are being drafted.

The response to Congressman Stafford's question will be supplied to him shortly, with a copy to the Committee, as you request. Any other written questions received will be similarly treated.

Sincerely yours,

LEWIS B. HERSHEY,
Director.

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, D.C., June 27, 1966.

Lt. Gen. LEWIS B. HERSHEY,
*Director, Selective Service System,
Washington, D.C.*

MY DEAR GENERAL HERSHEY: In accordance with the motion to which I understand the Committee agreed, made by the Honorable William H. Bates before the full Committee during your appearance as a witness, that Members might submit questions in writing for answer on your part, I herewith submit the following questions for response at your earliest convenience:

* * * * *

17. Should the draft be used for punitive purposes?

18. Should Selective Service have the authority to change a man's draft classification on the basis of its own judgment that he has violated Selective Service laws or regulations?

* * * * *

Sincerely yours,

ROBERT T. STAFFORD,
Member of Congress.

NATIONAL HEADQUARTERS,
SELECTIVE SERVICE SYSTEM,
OFFICE OF THE DIRECTOR,
Washington, D.C., July 21, 1966.

Hon. L. MENDEL RIVERS,
*Chairman, Committee on Armed Services,
House of Representatives.*

DEAR MR. CHAIRMAN: Attached, in compliance with your letter of July 8, 1966, and my interim reply of July 13, 1966, is a copy of my letter to Congressman Robert T. Stafford together with a copy of the responses to the questions he asked.

I trust this will meet your needs.

Sincerely yours,

LEWIS B. HERSHEY,
Director.

* * * * *

17. Should the draft be used for punitive purposes?

Selective service should not be used for punitive purposes if by that it is ment [*sic*] that one should be inducted into the armed forces as punishment for an offense which is not related to selective service.

When a man has violated the selective service law itself, the acceleration of his processing toward induction is not deemed to be "punitive." The law has placed the obligation to serve on virtually every man within the liable ages. Service

is characterized in the law, properly, as a privilege and a duty.

Except in the most flagrant cases, a violator of the selective service law will not be prosecuted if he is later willing to comply with the law by submitting to induction. The acceleration of processing for one who has violated the selective service law is merely a means of giving him an early opportunity to comply with the law rather than to be prosecuted. The accelerated processing involves reclassification of delinquents who are deferred into Class I-A by the local board. The registrant may appeal this classification.

Every registrant is presumed to be available for service unless he demonstrates to the satisfaction of the local board that the national interest requires his temporary deferment. The local board properly may consider whether a deferred registrant who violates the selective service law continues to serve the national interest.

18. Should Selective Service have the authority to change a man's draft classification on the basis of its own judgment that he has violated Selective Service laws or regulations?

In keeping with the policy that a delinquent normally should not be prosecuted if he is willing to comply with the law by submitting to induction, it is necessary that selective service boards when convinced that a man has violated the selective service law have authority to reclassify him and give him an opportunity to report for induction before referring him to the United States Attorney for prosecution. The only other alternative would be to require the boards to report a registrant for prosecution in every instance where there [*sic*] believe he has violated the law. It must be remembered that in almost every case the question whether a registrant has violated the law or regulations really does not involve the exercise of judgment. There is little in the way of independent

judgment involved when a determination is made that a man has not registered, has not kept the board advised of a change of address, has not kept the board advised of circumstances affecting his classification, has not reported for preinduction physical examination, or has not reported for induction; and these represent 99% or more of the violations. When the local board is criticized when it accelerates the processing of a registrant who is believed to be delinquent, it is too often forgotten that if the registrant refuses induction, his case will go to the court and he will then get as much judicial attention as he would have had if he had been referred there in the first instance.

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DAVIS, CLERK

OCTOBER TERM, 1969

No. 71

DAVID EARL GUTKNECHT,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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2

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IN THE
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
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REPLY BRIEF FOR PETITIONER*

The Attorney General's brief makes a predictable response to most of the arguments contained in petitioner's opening brief. Some of petitioner's arguments, such as that at pp. 61-63, concerning the interpretation of the term "duty" in the selective service regulations, the Attorney General does not directly answer. Most of the issues in this case are, however, well-framed by the briefs for oral argument. This reply brief attempts only to clarify some misimpressions concerning selective service law and practice which might be generated by the Attorney General's brief.

* Counsel respectfully request that this brief be considered applicable to the companion case of *Breen v. Selective Service*, No. 65.

The Order of Call

In his brief in *Breen*, No. 65, the Attorney General distinguishes *Breen*, from *Oestereich v. Selective Service Board*, 393 U.S. 233 (1969), by noting that in *Oestereich* the petitioner lost an "exemption," while in *Breen*, a "deferment" is at issue. This distinction is shown to be meaningless in petitioners' opening briefs in this case and in *Breen*.

The Attorney General, by similar reasoning, concludes that petitioner suffered no harm which the law can take note of when he was moved up from the place which he occupied in the order of call from among those who were I-A to the top of the priority list as a "delinquent." Gov't Brief, pp. 23-32. Since it is conceded that petitioner was inducted sooner than he would otherwise have been, *id.* at 26, and since (as pointed out in petitioner's opening brief) petitioner might in the meantime have acquired a deferable or exempt status, the Attorney General's point appears to be without merit. He does, however, insist upon it, and it bears noting, therefore, that the view of the federal courts has been that the "order of call" provisions of 32 C.F.R. §1631.7 are so important that if the registrant can establish that he has been called out of turn, his induction order is void. See *United States v. Lott*, 1 S.S.L.R. 3244, No. 1921—Criminal (C.D. Calif. Oct. 9, 1969); *United States v. Garcia-Miranda*, 1 S.S.L.R. 3249, Criminal 73-67 (D.P.R. Nov. 18, 1968); *Fore v. United States*, 395 F.2d 548 (10th Cir. 1968); *Baker v. United States*, No. 24024 (9th Cir. Sept. 17, 1969). See also *United States ex rel. Lynn v. Downer*, 140 F.2d 397 (2d Cir. 1944); *United States v. Smith*, 1 S.S.L.R. 3146, No.

41674 (N.D. Calif. May 22, 1968); *Yates v. United States*, 404 F.2d 462 (1st Cir. 1968), *reh. denied* 407 F.2d 50 (1969).

The only difference of view between courts is on the question whether the registrant or the government has the burden of going forward and the risk of nonpersuasion on the issue. Compare *Yates, supra*, with *United States v. Sandbank*, 403 F.2d 38 (2d Cir. 1968), *cert. denied*, 89 S. Ct. 1301 (1969).

Could Petitioner Have Had a Hearing Before the Board? Was He Prejudiced by Not Having Had One?

The government blandly asserts, p. 62, that petitioner could have had a hearing before the board on his alleged delinquency if he had asked for it. It goes so far as to fault petitioner for failing to request a hearing, p. 63. 32 C.F.R. §1642.14 deals with the hearing rights of registrants made delinquent by their local boards, and a fair reading of its language excludes the possibility of a hearing being granted as a matter of right to a registrant who is already in Class I-A at the time of delinquency declaration. Nowhere in the Selective Service regulations is a hearing provided for in such a case. Moreover, the government does not call the Court's attention to, nor is counsel aware of, any advisory opinion or order of any responsible Selective Service official requiring a hearing in such a case. If in the future local boards are directed, by regulation promulgated in accordance with 5 U.S.C. §552, to accord registrants in petitioner's circumstance a due process hearing, a different case than the one now before the Court will be presented.

Moreover, there was in this case no notice to petitioner of his supposed right; therefore, the "waiver" which the government would have the Court find to have taken place can by no stretch of the imagination be said to have been effective. See *Fay v. Noia*, 372 U.S. 391 (1963); *Johnson v. Zerbst*, 304 U.S. 458 (1938).

The question of prejudice from denial of a hearing is settled by *Simmons v. United States*, 348 U.S. 397, 406 (1955), also a selective service case, in which Mr. Justice Clark wrote for the majority: "Petitioner has been deprived of the fair hearing required by the Act, a fundamental safeguard, and he need not specify the precise manner in which he would have used this right—and how such use would have aided his cause—in order to complain of the deprivation."

Reliance on the Unconstitutional Hershey Directive

The Attorney General notes the view of the courts below that the local board in this case acted to cause petitioner's precipitate induction solely upon the basis of his failure to possess his selective service certificates, and not on the basis of the Hershey directive to reclassify demonstrators. Both courts below, in making their findings, ignored a leading selective service decision of this Court: *Sicurella v. United States*, 348 U.S. 385 (1955). In *Sicurella*, the Department of Justice had recommended against granting the registrant's application for conscientious objector status, based upon a legal premise which this Court found to be erroneous. This Court held "that this error of law by the Department, to which the Appeal Board might naturally look for guidance on such questions, must vitiate

the entire proceedings at least where it is not clear that the Board relied upon some legitimate ground. Here, where it is impossible to determine on exactly what grounds the Appeal Board decided, the integrity of the Selective Service System demands, at least, that the Government not recommend illegal grounds." 348 U.S. at 392. In this case, the board held no hearing, took no testimony, made no record, and had before it both the fact that the registrant "participated in a demonstration" and that he turned in his "draft cards." App., pp. 42-43. Under these circumstances, and having as well the memorandum of General Hershey (Appendix B to Petitioner's Opening Brief) "to which the . . . Board might naturally look for guidance," *Sicurella* requires reversal if the Court concludes that the Hershey memorandum is unconstitutionally vague and broad. See *Nat'l Student Ass'n v. Hershey*, 412 F.2d 1103 (D.C. Cir. 1969).

Conscription as the "Raising of Armies," and Delinquency as a Means to That End

The central thrust of the Attorney General's brief, expressed explicitly at several points and basic to his argument, is that the system of conscription is part of a Congressional design to raise and maintain an army, and that the position adopted in petitioner's brief would undermine the Congressional design. *E.g.*, pp. 48-49. Corollaries of this argument include the assertion that the delinquency power is necessary to deal with the rising tide of dissent from the government's war policy, *id.*, and that petitioner has suffered no legal harm the law need take notice of.

It is fitting that in support of his argument, the Attorney General should cite authorities which reflect a now-

discredited view of the administrative process and of administrative imposition of sanctions. At pages 60-61 of his brief, he relies upon the following cases: *Milwaukee Publishing Co. v. Burleson*, 255 U.S. 407 (1921), the dissenting opinions in which were adopted by this Court in *Hannegan v. Esquire, Inc.*, 327 U.S. 146 (1946), and *Lamont v. Postmaster General*, 381 U.S. 301 (1965); *Adler v. Board of Education*, 342 U.S. 485 (1952), disapproved in *Keyishian v. Board of Regents*, 385 U.S. 589, 595 (1967), a number of public employment and licensing cases, e.g., *Garner v. Los Angeles Board*, 341 U.S. 716 (1951); *Barsky v. Board of Regents*, 347 U.S. 442 (1954), the rationales of which are seriously undercut by, e.g., *Sherbert v. Verner*, 374 U.S. 398 (1963), *Spevack v. Klein*, 385 U.S. 511 (1967), and *Cramp v. Board of Public Instr.*, 368 U.S. 278 (1961). See also *United States v. Brown*, 381 U.S. 437 (1965); Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439 (1968).

The inappositeness of his reliance on these authorities to one side, the Attorney General is caught between the necessity of arguing the efficacy of the delinquency power and the equally strong need to disaffirm that the delinquency power is used to punish registrants. Much of his argument in this connection is premised upon the regard in which military service is held, negating, so it is argued, the proposition that military service could be punishment. This argument was anticipated to a great extent in petitioner's opening brief, and answered there. It should be noted, though, that the question whether conscripting a man into military service as a consequence of violation of regulations is "punishment" must be answered not from

the public's perception of the soldier's status, but from the registrant's standpoint. The government cannot pre-empt individual choice as to which means of confinement—military service or the possibility of imprisonment for violation of law—is preferable and justify this pre-emption based on its view of the more desirable alternative. This was the rationale which formed the rule of *Lynch v. Overholser*, 369 U.S. 705 (1961). *Lynch* held that the government could not enter a plea of not guilty by reason of insanity on behalf of a misdemeanor defendant in order to obtain for him the commitment to a mental hospital which it asserted was in his and society's interest. See generally Morris, *Persons and Punishment*, 52 *The Monist* 475 (1968). Moreover, the government's own characterization of the delinquency power as coercive, a "club," should lead one to doubt its assertions. And the government's justification for the delinquency power on the ground that it frees the criminal courts from having to try violators of the regulations comes perilously close to conceding the point altogether that the invocation of the delinquency power on the facts of this case is punishment.

Furthermore, the Attorney General's assertion that the speedy and efficient remedy of delinquency inductions is necessary in light of the increased opposition to the war and the draft is a statement of purported fact which is self-justifying and self-fulfilling. As long ago as 1966, a perceptive reporter noted that the "almost universal dissatisfaction" with the draft laws was a powerful stimulus to such opposition.¹ The high-handed behavior of local boards, operating under a roving commission to find and summarily deal with antidraft activity, must heighten that

¹ Quoted in Comment, 54 *Calif. L. Rev.* 2123, 2125 n. 6 (1966).

sense of unfairness and lead in turn to even greater supposed need to depart from traditional due process guarantees in checking registrants' activities.

The government also seeks to avoid the force of petitioner's argument by stating that a local board would abuse its discretion if it refused to remit a delinquency declaration upon the registrant bringing himself into compliance with the law. As noted in petitioner's opening brief, there was once a standard in the regulations whereby delinquency status was to be terminated. See p. 22. Today, however, no such standard exists, and the Attorney General lacks the power to promulgate a regulation setting up such a standard and to enforce compliance with his views in any other way. The Selective Service System, as an independent agency, is not bound by his concession. Perhaps if such a regulation is at some future time issued, the Court can reach the issue. In an appendix to this brief, petitioner reproduces correspondence between attorneys for a registrant and the Selective Service System which indicates that the interpretation of the delinquency regulations is at best uncertain. It seems appropriate, petitioner submits, to confront the delinquency regulations on their face, as the unconfined and vagrant arrogation of power they surely represent.

Finally, there is a more fundamental objection to the Attorney General's position. Under the Selective Draft Law of 1917, and even under the Selective Training and Service Act of 1940 as applied during the wartime emergency, the objective of total national mobilization was foremost in the minds of Congress, the courts and those charged with administering the statutory scheme. The institution of peacetime conscription has, since 1948, given the Selec-

tive Service System a central responsibility in the direction of the national economy.² Operating to some extent on the basis of Congressionally-determined priorities (*e.g.*, the conscientious objector, public official, ministerial and undergraduate student classifications and the order of call provisions), but to a very much more significant extent upon the basis of local board discretion (*e.g.*, occupational deferments, see Local Board Memorandum No. 95, reprinted at Sel. Serv. L. Rep. 2200:5) and administrative fiat (see Appendix B to petitioner's brief), the System is charged with determining which young men shall serve and which shall not.³ We do not, that is, have a system of universal liability such as would exist if the names of all young men between the ages of 18 and 35 were placed in a hat and drawings were regularly held. In such a case, the job of courts would be limited to making sure that the names of all young men went in the hat and that the person drawing had his blindfold securely fastened. The "selective" character of the conscription system, deliberately emphasized in the 1967 re-enactment and amendment of the act,⁴ requires that conscious choices be made as to whose civilian function is sufficiently important to exclude him from the ranks of those who must wear the uniform and risk death in battle. The Selective Service System is, therefore, no different analytically from the Federal Power Commission or the

² See Hershey, *Evaluation of the Selective Service Program*, Special Monograph No. 18, Vol. 1 (1956); Tigar & Zweben, *Selective Service: Some Certain Problems*, 37 Geo. Wash. L. Rev. 510 (1969), at 510.

³ See Nat'l Advisory Comm'n on Selective Service, *In Pursuit of Equity: Who Serves When Not All Serve?* (1967).

⁴ Civilian Advisory Panel on Manpower Procurement, *Report to Committee on Armed Services*, 90th Cong., 1st Sess., at 10 (Comm. Print 1967).

Federal Communications Commission, both of which are also charged with the duty of regulating some sector of the national economy in the "public interest." (An important difference is that the resource being managed by the System is the precious and human one of America's young men.) And while the decisions of these agencies are given great deference by the courts, that deference is accorded only when the means by which decision is reached is reliable and provides for all relevant claims to be fairly considered. See, e.g., *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966); *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

This view of the System as a regulatory agency bound to observe the same basic principles which govern those who administer natural gas or the broadcast spectrum, finds echo in the statutory command that the System shall be "fair and just." Military Selective Service Act of 1967, §1.

CONCLUSION

For the foregoing reasons, and those set out in petitioner's opening brief, the conviction should be reversed.

Respectfully submitted,*

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Los Angeles
Los Angeles, California 90024

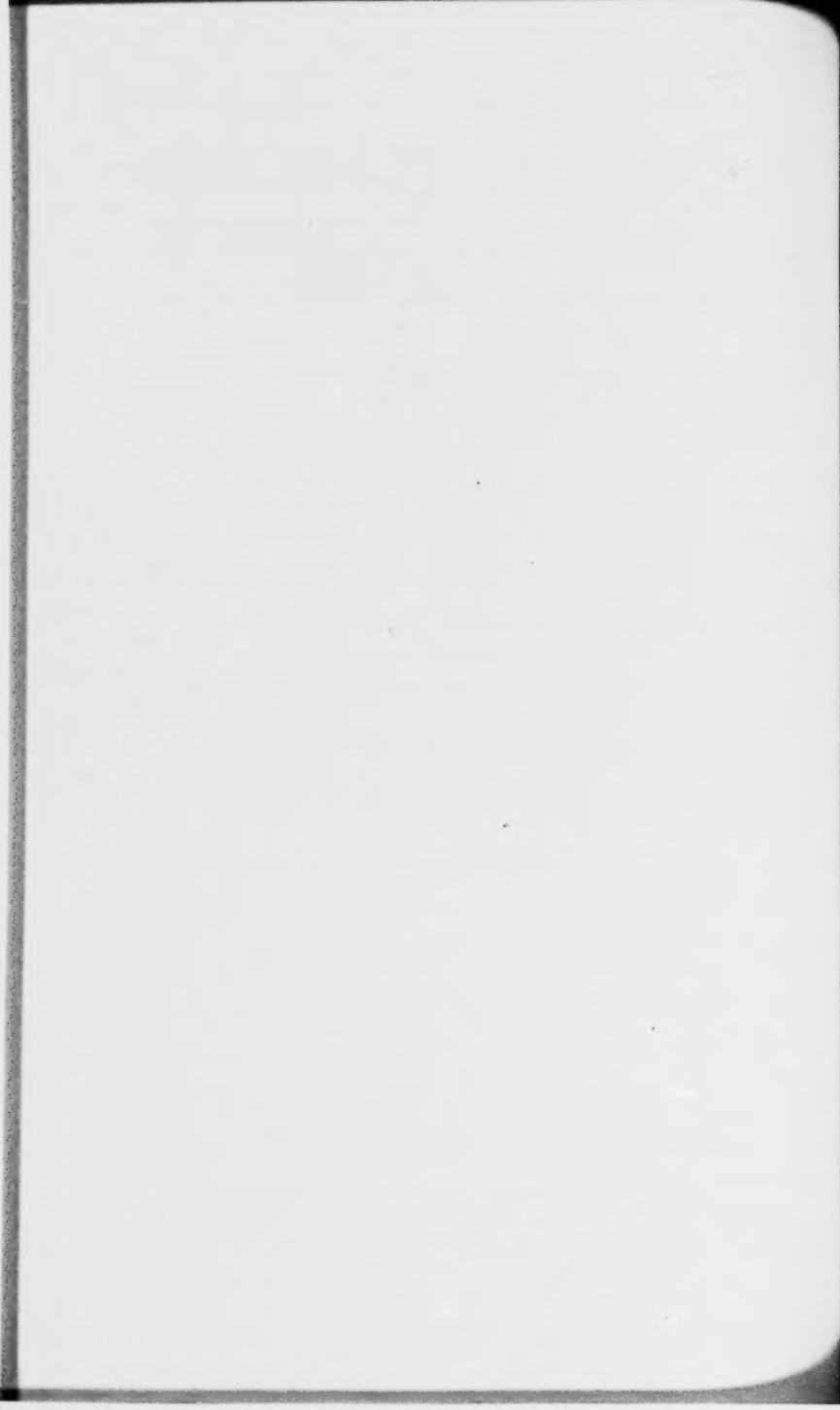
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November 1969

* Counsel gratefully acknowledge the research assistance of Jeffrey B. Kupers, a third-year student at the School of Law, University of California, Los Angeles.



APPENDIX

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APPENDIX

APPENDIX

[Letterhead omitted]

March 4, 1969

Lt. Col. Thomas L. Jensen
State Director of Selective Service
USMC Federal Bldg.
Sacramento, California 95814

Re: Warshaw, Paul R.
SS No. 4 60 44 80

Dear Col. Jensen:

I represent the above-named registrant.

In August of 1967, Mr. Warshaw filed as a conscientious objector with his local board. He was subsequently ordered to report for an Armed Forces Physical Examination on July 31, 1967. On August 15, 1967 Mr. Warshaw was declared delinquent for "refusal to cooperate" during that physical, having been ejected from the examining station for distributing leaflets. He was ejected despite the fact that he did not disrupt the activities of the station and despite his stated willingness to complete the examination. In a letter to his local board after being declared delinquent, he restated that willingness. At this time Mr. Warshaw is under an order to report for induction as a delinquent, but has asked that his induction be transferred to New York.

Leaving aside the questionable circumstances leading to his being declared delinquent, Mr. Warshaw has repeatedly made clear his willingness to cure his delinquency by taking another physical examination. In view of the provisions for removal from delinquency in §1642.4(c) of the Regula-

tions, his retention in delinquency status is wholly arbitrary.

On January 30, 1968 Mr. Warshaw appeared before his board to discuss his conscientious objector claim. He also completed SSS Form No. 151, volunteering for civilian work as proof of the sincerity of his claim. At the appearance, the board questioned him continuously about his delinquency only touching on his conscientious objector claim when Mr. Warshaw asked a member of the board if he had heard of the *Seeger* decision. His claim was thereafter rejected both by the local board and appeal board. There is no evidence within the file to support this rejection. The board's concern at the meeting, with the cause of his delinquency, rather than with his conscientious objector claim caused Mr. Warshaw's claim to be given less than due consideration. His delinquency may, from Mr. Warshaw's account of the meeting, have even prejudiced his claim. A registrant cannot be deprived of an exemption "because of conduct or activities unrelated to the merits of granting or continuing that exemption." *Oestereich v. Selective Service*, 1 SSLR 3215, 3216, — U.S. — (U.S.S.C. 1968).

Finally, Mr. Warshaw has made repeated requests in writing that he be given an interview with the medical advisor pursuant to §1628.2(b). These requests have been totally ignored, a clear violation of the regulations.

Therefore, on the basis of the aforementioned facts may I request the intervention of your office to consider removing Mr. Warshaw from delinquency status and to insure that his other procedural rights are observed.

Very truly yours,

Alan H. Levine
Staff Counsel

AHL:ig

[Letterhead of California Headquarters,
Selective Service System, omitted]

April 30, 1969

Mr. Alan H. Levine
Staff Counsel
New York Civil Liberties Union
156 Fifth Avenue
New York, New York 10010

Subject: Warshaw, Paul Rod
SS No. 4 60 44 80

Dear Sir:

This is to acknowledge receipt of your letters, dated March 4, 1969, and April 7, 1969, regarding the status of the above-named registrant with the Selective Service System.

A review of the registrant's selective service file discloses that he has been afforded all due process under the law, and this Headquarters can find no basis to justify intervention in the case.

The registrant's local board, on February 14, 1969, mailed him an order to report for induction on February 26, 1969. We presume the registrant has requested transfer for induction through the local board nearest his present place of residence. If the registrant is of the opinion that he has a physical condition that would render him unac-

ceptable for service in the armed forces, he should be advised to obtain verification of his physical condition and take such a statement with him when he reports for induction.

For the State Director

/s/ R. A. SCOTT

R. A. Scott

Major, USAF

Chief, Classification Section

cc: Local Board No. 60

[Letterhead omitted]

May 13, 1969

Major R. A. Scott, USAF
Chief, Classification Section
California Headquarters of the Selective Service System
Federal Building
801 I St.
Sacramento, Calif. 95814

Re: Warshaw, Paul Rod
SS No. 4 60 4480

Dear Major Scott:

Pursuant to our telephone conversation of last week and our prior correspondence concerning the above named registrant, this office hereby requests that Mr. Warshaw be permitted to remove himself from delinquent status by submitting to a new physical examination. We understand that such removal would constitute an immediate cancellation of his now outstanding order to report for induction here in New York on May 21, 1969, inasmuch as delinquents are to be inducted prior to other registrants and are therefore removed from the order of call. (32 C.F.R. 1631.7)

It is our understanding that Selective Service regulations 1642.2, 1642.4(c) provide for the continuing duty of a registrant to cure his delinquency and the power of his legal board to remove him therefrom. To deprive a registrant from the protection of these regulations would render them nugatory. The delinquency regulations are directed towards compliance and not punishment. See *Oesterich v. Local Board*, 37 U.S.L.W. 4053.

Furthermore, it is our belief that Mr. Warshaw's local board may have been influenced adversely to his claim of conscientious objection, by his delinquency. He maintains that the merits of his claim were never reached, the board being inordinately preoccupied with the reasons for his delinquency.

Mr. Warshaw is prepared at this time to purge his delinquency and comply with the dictates of the Selective Service System in this regard.

As his induction is scheduled for May 21, I trust an immediate reply will be forthcoming.

Very truly yours,

Edwin J. Oppenheimer
Program Coordinator
Selective Service and
Military Law Panel

[Letterhead of California Headquarters, Selective
Service System, omitted]

June 4, 1969

Mr. Edwin J. Oppenheimer
New York Civil Liberties Union
156 Fifth Avenue
New York, New York 10010

Subject: WARSHAW, Paul Rod
SS No. 4 60 44 80

Dear Sir:

This Headquarters has again reviewed the circumstances in the case of the above-named registrant, as requested in your letter of May 13, 1969. Our position remains the same as outlined in our letter, dated April 30, 1969, to Mr. Alan H. Levine.

We are, therefore, returning the registrant's file to his local board with a copy of your letter, for the local board's review.

This Headquarters can find no basis to justify further intervention in the case.

For the State Director

/s/ R. A. SCOTT

R. A. Scott

Major, USAF

Chief, Classification Section

cc: Local Board No. 60

[Letterhead omitted]

June 10, 1969

Local Board No. 50
Community Bank Building
111 West St. John's Street
Room 200
San Jose, California

Re: WARSHAW, PAUL R.
SS No. 4 60 44 80

Dear Sirs:

Be advised that the above named registrant is represented by attorneys in this office.

Mr. Warshaw remains, as previously stated, desirous to cure his delinquency status and avoid his impending priority induction.

Please schedule him for a new pre-induction physical examination and cancel his now outstanding order for induction. The curing of delinquency is of course provided for under SS Reg. 1642.4(c). To prevent Mr. Warshaw from curing his delinquency would be wholly arbitrary as delinquency is directed at compliance with the dictates of the Selective Service System and not punishment. See *Oestereich v. Selective Service* 1 SSLR 3215 (U.S.S.C. 1968).

It is therefore urged that the requests outlined in our letters of March 4 and May 13 to Maj. R. A. Scott of your State Headquarters be complied with.

We trust an immediate response will be forthcoming.

Very truly yours,

Edwin Oppenheimer
Program Coordinator
Selective Service and Military
Law Panel

cc: Maj. R. A. Scott

SELECTIVE SERVICE SYSTEM

Local Board No. 60
Community Bank Bldg., Rm. 200
111 West St. John Street
San Jose, California 95113

June 16, 1969

New York Civil Liberties Union
156 Fifth Avenue
New York, New York 10010

Attention: Edwin Oppenheimer, Program Coordinator
Selective Service and Military Law Panel

Subject: WARSHAW, PAUL ROD
SS No. 4-60-44-80

This will acknowledge receipt of your letter of June 10, 1969, regarding the classification of the above-named registrant.

The information contained therein has been considered by this Board and it is of the opinion that the facts presented do not warrant the reopening of the registrant's classification.

BY DIRECTION OF THE LOCAL BOARD

/s/ MARY JO STODDARD

Mary Jo Stoddard, Exec. Sec.
(Local Board Clerk)

The registrant is scheduled for delinquent induction on June 25, 1969 and has been instructed to report as ordered.

[Letterhead omitted]

June 20, 1969

Lt. Col. Roy R. Bartlett
Assistant General Counsel
National Headquarters of Selective Service
1724 "F" Street N.W.
Washington, D.C.

Re: Paul R. Warshaw
SS No.: 4 60 44 80

Dear Colonel Bartlett:

Pursuant to our telephone conversation of Wednesday, June 18th, I am herewith writing you concerning the above named registrant who has been declared delinquent by his local board for alleged noncooperation during a pre-induction physical examination on July 31, 1967. Mr. Warshaw is represented by attorneys affiliated with this office.

I am herein enclosing copies of correspondence between staff counsel, myself and the California State Director's Office as well as the registrant's local board.

The circumstances surrounding Mr. Warshaw's delinquency are reiterated therein.

Mr. Warshaw has, since the time he was declared delinquent, attempted to cure his delinquency pursuant to the instructions on SSS Form 304 (Delinquency Notice):

"2. You are hereby directed to report to this Local Board immediately in person or by mail, or to take or this notice to the Local Board nearest you *for advice as to what you should do.*" (emphasis added)

This instruction, coupled with the provisions of SS Regulation 1642.4(c), ["A registrant who has been declared to be a delinquent may be removed from that status at any time" (emphasis added)], clearly indicated that the delinquency provisions are directed towards compliance and not punitive induction.

"The delinquency regulations are designed as an administrative means of insuring that the registrant complies with the duties he personally owes the Selective Service System . . . these regulations are basically remedial rather than punitive in nature. Indeed the primary purpose of delinquency is to bring the registrant back into compliance with his duties." *Brief of the Solicitor General in Oesterich v. Selective Service, April 1968, October Term.*

For Mr. Warshaw's local board to persist in continuing his delinquency despite both his and our numerous attempts for him to be allowed to purge his delinquency is clearly arbitrary. Such action renders both 1642.4(c) ineffectual and flies in the face of the Government's position with regard to delinquency as stated in the Solicitor General's brief, *supra*.

The interest of the Selective Service System in retaining Mr. Warshaw in delinquent status, with implies a violation of federal law, despite his earnest desire to remove himself therefrom cannot be so great. Even General Hershey in his letter of October 1967 recognized that registrants who commit acts which lead to their being declared delinquent may be "misguided".

Mr. Warshaw is under an order to report for priority induction as a delinquent. He is and has been most desirous to cure his delinquency.

We hope that this can be effected.

Very truly yours,

Edwin J. Oppenheimer, Jr.
Program Coordinator
Selective Service and Military
Law Panel

EJO:eh
Encs.

Office of the Director
National Headquarters
SELECTIVE SERVICE SYSTEM
1724 F Street NW.
Washington, D. C. 20435

Jul 24 1969

Mr. Edwin J. Oppenheimer, Jr.
New York Civil Liberties Union
156 Fifth Avenue
New York, New York 10010

Subject: WARSHAW, Paul R.
SS No. 4-60-44-80

Dear Mr. Oppenheimer:

This is in reply to your letter dated June 20, 1969, regarding the case of the above-named registrant. Following the receipt of your letter, the registrant's file was secured and has been reviewed by our office.

Our examination of the cover sheet disclosed that this registrant was declared a delinquent by his local board for his refusal to cooperate during an Armed Forces Physical Examination on July 31, 1967. His refusal to cooperate consisted of a refusal to obey the orders of the examining station personnel to desist from conduct regarded as disruptive of the physical examination processing of this registrant and other registrants who were present for physical examinations. In a letter to the local board dated August 27, 1967, the registrant described in detail his activities in passing out anti-draft leaflets at the examining station after and despite requests by the examining station personnel

that he refrain from doing so. In this same letter the registrant states that in any future physical examinations he will hand out leaflets as before since this is his legal right.

Under section 1642.4 of the Selective Service Regulations, the declaration of delinquency status and the removal therefrom is a matter for determination by the registrant's local board. In this case, in view of the registrant's stated intention to persist in the course of conduct because of which he was first declared a delinquent, we do not find that the local board's refusal to remove the delinquency is in any way arbitrary or capricious.

The Manpower Division of this Headquarters has been requested to review the cover sheet to determine if there is a basis in fact for denial of the registrant's claim of conscientious objections.

For The Director,

/s/ ROY R. BARTLETT
ROY R. BARTLETT
Lt. Colonel, JAGC
Associate General Counsel

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No 71.—OCTOBER TERM, 1969

David Earl Gutknecht,	}	On Writ of Certiorari to the
Petitioner,		United States Court of
v.		Appeals for the Eighth
United States.		Circuit.

[January 19, 1970]

MR. JUSTICE DOUGLAS delivered the opinion the Court.

This case presents an important question under the Military Selective Service Act of 1967. 62 Stat. 604, as amended, 65 Stat. 75, 81 Stat. 100.

Petitioner registered with his Selective Service Local Board and was classified I-A. Shortly thereafter he received a II-S (student) classification. In a little over a year he notified the Board that he was no longer a student and was classified I-A. Meanwhile he had asked for an exemption as a conscientious objector. The Board denied that exemption, reclassifying him as I-A, and he appealed to the State Board. While that appeal was pending, he surrendered his registration certificate and notice of classification by leaving them on the steps of the Federal Building in Minneapolis with a statement explaining he was opposed to the war in Vietnam. That was on October 16, 1967. On November 22, 1967, his appeal to the State Board was denied. On November 27, 1967, he was notified that he was I-A.

On December 20, 1967, he was declared delinquent by the local board. On December 26, 1967, he was ordered to report for induction on January 24, 1968. He reported at the induction center, but in his case the normal procedure of induction was not followed. Rather, he signed a statement, "I refuse to take part or all [*sic*] of the pre-

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scribed processing." Thereafter he was indicted for wilfully and knowingly failing and neglecting "to perform a duty required of him" under the Act. He was tried without a jury, found guilty, and sentenced to four years' imprisonment. 283 F. Supp. 945. His conviction was affirmed by the Court of Appeals. 406 F. 2d 494. The case is here on a petition for a writ of certiorari. 394 U. S. 997.

I

Among the defenses tendered at the trial was the legality of the delinquency Regulations which were applied to petitioner. It is that single question which we will consider.

By the Regulations promulgated under the Act a local board may declare a registrant to be a "delinquent" whenever he

"has failed to perform any duty or duties required of him under the selective service law other than the duty to comply with an Order to Report for Induction (SSS Form No. 252) or the duty to comply with an Order to Report for Civilian Work and Statement of Employer (SSS Form No. 153)" 32 CFR § 1642.4.

In this case, petitioner was declared a delinquent for failing to have his registration certificate (SSS Form No. 2) and current classification notice (SSS Form No. 110) in his personal possession at all times, as required by 32 CFR §§ 1617.1 and 1623.5, respectively.

The consequences of being declared a delinquent under § 1642.4 are of two types: (1) Registrants who have deferments or exemptions may be reclassified in one of the classes available for service, I-A, I-A-O, or I-O, whichever is deemed applicable. 32 CFR § 1642.12. (2) Registrants who are already classified I-A, I-A-O, or I-O, and those who are reclassified to such a status,

will be given first priority in the order of call for induction, requiring them to be called even ahead of volunteers for induction. 32 CFR § 1642.13. The latter consequence deprives the registrant of his previous standing in the order of call as set out in 32 CFR § 1631.7.¹

The order-of-call provision in use when petitioner was declared "delinquent"² is set out in 32 CFR § 1631.7 (a). The provision lists, in order, six categories of registrants and provides that the registrants shall be selected and ordered to report for induction according to the order of those categories. The first category is delinquents; the next category is volunteers; the other four categories are comprised of non-volunteers. In this case, the petitioner was in the third of the six categories at the time he was declared to be a "delinquent." By virtue of the declaration of delinquency he was moved to the first of the categories which meant, according to the brief of the Department of Justice, that "it is unlikely that petitioner, who was 20 years of age when ordered to report for induction, would have been called at such an early age had he not been declared a delinquent."

If a person, who is ordered to report for induction or alternative civilian service, refuses to comply with that order, he subjects himself to criminal prosecution. See 32 CFR §§ 1642.41, 1660.30.

There is no doubt concerning the propriety of the latter criminal sanction, for Congress has specifically

¹ Under the terms of 32 CFR § 1631.7 (a)(1) in effect at the time of petitioners trial, the first in line for induction were "Delinquents who have attained the age of 19 years in the order of their dates of birth with the oldest being selected first." That provision has been included in the new § 1631.7 (a) promulgated after the random system of selection, discussed hereafter, was adopted.

² The order of call provided for by 32 CFR § 1631.7 (b) concerned calls of designated "age group or groups," a system never used.

provided for the punishment of those who disobey selective service statutes and regulations in § 12 of the Military Selective Service Act of 1967, 50 U. S. C. App. § 462. The question posed by this case concerns the legitimacy of the delinquency Regulations, which were applied to the petitioner, so as to deprive him of his previous standing in the order of call.

II

There is a preliminary point which must be mentioned and that is the suggestion that petitioner should have taken an administrative appeal from the order declaring him "delinquent" and that his failure to do so bars the defense in the criminal prosecution.

The pertinent Regulation is 32 CFR § 1642.14, which gives a delinquent who "is classified in or reclassified into Class I-A, Class I-A-O or Class I-O" three rights:

(a) the right to a personal appearance, upon request, "*under the same circumstances as in any other case*";

(b) the right to have his classification reopened "*in the discretion of the local board*"; and

(c) the right to an appeal "*under the same circumstances and by the same persons as in any other case.*"

The right to a personal appearance "in any other case" is covered by 32 CFR § 1624.1 (a). That section gives the right to "every registrant *after his classification is determined by the local board*" provided a request is made therefor within 30 days. The action taken against this petitioner, however, did not involve classification. The term "classification" is used exclusively in the Regulations to refer to classification in one of the classes determining availability for service, *e. g.*, I-A, I-O. See 32 CFR Pts. 1621-1623. "Delinquency" is not such a classification, and a registrant is "declared" a delinquent, not "classified" as a delinquent. See 32 CFR Pt. 1642.

The right to reopen his classification is also irrelevant to petitioner as he is not attacking his classification, but only his accelerated induction.

The right to appeal "in any other case" is covered by 32 CFR § 1626.2 (a). That section provides that "the registrant . . . may appeal to an appeal board from the classification of a registrant by the local board."

Again, since petitioner was not classified in conjunction with his delinquency, but only had his induction accelerated, it would mean that he did not have the right to an appeal under the Regulations.³ We are not advised in any authoritative way, that this interpretation of the Regulations is contrary to the administrative construction of them or to the accepted practice.⁴

³ Cf. *McKart v. United States*, 395 U. S. 185. In *McKart*, the petitioner, who challenged his I-A classification, was given a right to appeal under the Regulations but failed to exercise it. This Court held that this failure did not preclude the petitioner from raising the invalidity of his I-A classification as a defense to his prosecution for refusal to report for induction. The doctrine of exhaustion of remedies, we held, was inapplicable where the question sought to be raised was solely one of statutory interpretation, *id.*, at 197-199, and where application of the doctrine would serve to deprive a criminal defendant of a defense to his prosecution. *Id.*, at 197.

⁴ The Department of Justice does not suggest that a registrant who has been declared a "delinquent" has administrative remedies for a review of that action. It points out, however, that the Regulations, 32 CFR § 1642.4 (c), provide that "A registrant who has been declared to be a delinquent may be removed from that status by the local board at any time." It suggests that "at least up to the time of the issuance of the order to report for priority induction, it would be an abuse of discretion for a board to refuse removal in the case of a registrant who sought in good faith to correct his breach of duty." Whatever may be the ultimate reach of 32 CFR § 1642.4 (c), it seems to be conceded that it has little relevance to the present case where, the Department states, "the local board has solid evidence that petitioner had dispossessed himself of his draft card."

III

We come then to the merits. The problem of "delinquency" goes back to the 1917 Act, as shown in the Appendix to this opinion. The present "delinquency" Regulations with which we are concerned stem from the 1948 Act.

The Regulations issued under the 1948 Act were substantially identical to the present delinquency regulations. 32 CFR, Pt. 1642. Nothing in the 1948 Act or in any prior Act makes reference to delinquency or delinquents. The regulations purport to issue under the authority of § 10 of the 1948 Act. Section 10, however, relates neither to selection (§ 5) nor to deferments and exemptions (§ 6), but simply to the administration of the Act as delegated to the President: "The President is authorized—(1) to prescribe the necessary rules and regulations to carry out the provision of this title." 62 Stat. 619.

The delinquency provisions of 32 CFR, Pt. 1642, survived the 1967 Military Selective Service Act largely intact. Again, however, there is nothing to indicate that Congress authorized the Selective Service System to reclassify exempt and deferred registrants for punitive purposes and to provide for accelerated induction of delinquents. Rather, the Congress reaffirmed its intention under § 12 (50 U. S. C. App. § 462), to punish delinquents through the criminal law.

It is true, of course, that Congress referred to "delinquents" in § 6 (h)(1), 81 Stat. 102, 50 U. S. C. App. § 456 (h)(1):

"As used in this subsection, the term 'prime age group' means the age group which has been designated by the President as the age group from which selections for induction into the Armed Forces are first to be made *after delinquents* and volunteers." (Emphasis added.)

This reference concerns only an order-of-call provision which institutes a call by age groups, 32 CFR § 1631.7 (b), a provision which has never been used. This casual mention of the term "delinquents," moreover, must be measured against the explicit congressional provision for criminal punishment of those who violate the selective service laws, 50 U. S. C. App. § 462, the congressional provision for exemptions and deferments, 50 U. S. C. App. § 456, and congressional expressions emphasizing the importance of an impartial order of call, 50 U. S. C. App. § 455; H. R. Rep. No. 346, 90th Cong., 1st Sess., at 9-10. Thus it was that the Solicitor General stated in his brief in *Oestereich v. Selective Service Board*, 393 U. S. 233:

"It is difficult to believe that Congress intended the local boards to have the unfettered discretion to decide that any violation of the Act or regulations warrants a declaration of delinquency, reclassification and induction. . . ." Brief for the United States, at 54.

Judge Dooling stated in *United States v. Eisdorfer*, 299 F. Supp. 975, 989:

"The delinquency procedure has no statutory authorization and no Congressional support except what can be spelled out of the 1967 amendment to 50 U. S. C. App. § 456 (h)(1) The delinquency regulations, moreover, disregard the structure of the Act; deferments and priorities-of-induction, adopted in the public interest, are treated as if they were forfeitable personal privileges."

Oestereich involved a case where a divinity school student with a statutory exemption and a IV-D classification was declared "delinquent" for turning in his registration certificate to the government in protest to the war in Vietnam. His Board thereupon reclassified him as I-A. After he exhausted his administrative

remedies, he was ordered to report for induction. At that point he brought suit in the District Court for judicial review of the action by the Board. We held that under the unusual circumstances of the case, pre-induction judicial review was permissible prior to induction and that there was no statutory authorization to use the "delinquency" procedure to deprive a registrant of a statutory exemption. We said:

"There is no suggestion in the legislative history that, when Congress has granted an exemption and a registrant meets its terms and conditions, a Board can nonetheless withhold it from him for activities or conduct not material to the grant or withdrawal of the exemption. So to hold would make the Boards free-wheeling agencies meting out their brand of justice in a vindictive manner.

"Once a person registers and qualifies for a statutory exemption, we find no legislative authority to deprive him of that exemption because of conduct or activities unrelated to the merits of granting or continuing that exemption." 393 U. S., at 237.

The question in the instant case is different because no "exemption," no "deferment," no "classification" in the statutory sense is involved. "Delinquency" was used here not to change a classification but to accelerate petitioner's induction from the third category to the first; and it was that difference which led the Court of Appeals to conclude that what we said in *Oestereich* was not controlling here.

Deferment of the order of call may be the bestowal of great benefits; and its acceleration may be extremely punitive. As already indicated, the statutory policy is the selection of persons for training and service "in an impartial manner." 50 U. S. C. App. § 455 (a)(1). That is the only express statutory provision which gives

specific content to that phrase. That section does permit people registered at one time to be selected "before, together with, or after" persons registered at a prior time. Moreover, those who have not reached the age of 19 are given a deferred position in the order of call. But those variations in the phrase "in an impartial manner" are of no particular help in the instant case, except to underline the concern of Congress with the integrity of that phrase.

We know from the legislative history that, while Congress did not address itself specifically to the "delinquency" issue, it was vitally concerned with the order of selection, as well as with exemptions and deferments. Thus in 1967 a Conference Report brought House and Senate together against the grant of power to the President to initiate "a random system of selection"—a grant which, it was felt, would preclude Congress from "playing an affirmative role" in the constitutional task of "raising armies." H. Rep. No. 346, *supra*, at 9-10. It is difficult to believe that with that show of resistance to grant of a more limited power, there was acquiescence in the delegation of a broad, sweeping power to Selective Service to discipline registrants through the "delinquency" device.

The problem of the order of induction was once more before the Congress late in 1969. Section 5 (a)(2) of the 1967 Act, 50 U. S. C. App. § 455 (a)(2) provided:

"Notwithstanding the provisions of paragraph (1) of this subsection, the President in establishing the order of induction for registrants within the various age groups found qualified for induction shall not effect any change in the method of determining the relative order of induction for such registrants within such age groups as has been heretofore established and in effect on the date of enactment of this

paragraph, unless authorized by law enacted after the date of enactment of the Military Selective Service Act of 1967."

While § 5 (a)(2) gave the President authority to designate a prime age group for induction, it required him to select from the oldest first within the group. S. Rep. No. 91-531, 91st Cong., 1st Sess., p. 1. The Act of November 26, 1969, 83 Stat. 220, repealed § 5 (a)(2) pursuant to a request of the President that a random system of selection be authorized. See S. Rep. No. 91-531, *supra*, pp. 3-4; H. R. Rep. No. 91-577, 91st Cong., 1st Sess., pp. 2, 9.⁵ The random system has now been put in force.⁶ It applies of course only prospectively. But its legislative history, as well as the concern of the Congress that the order in which registrants are inducted be achieved "in an impartial manner," emphasizes a deep concern by Congress with the problems of the order of induction as well as with those of exemptions, deferments, and classifications.

While § 5 (a)(1) provides that "there shall be no discrimination against any person on account of race or color," 50 U. S. C. App. § 455 (a)(1), there is no suggestion that as respects other types of discrimination the Selective Service has free-wheeling authority to ride herd on the registrants using immediate induction as a disciplinary or vindictive measure.

The power under the regulations to declare a registrant "delinquent" has no statutory standard or even guidelines. The power is exercised entirely at the discretion of the local board. It is a broad, roving authority, a

⁵ And see 115 Cong. Rec., October 29, 1969, p. H 10255 *et seq.*, *ibid.* October 30, 1969, pp. H 10301 *et seq.*, H 10313 *et seq.*, *ibid.* November 19, 1969, p. S 14632 *et seq.*

⁶ The random selection was established by the President through Proclamation 3945, on November 26, 1969. 34 Fed. Reg. 19017 (November 29, 1969).

type of administrative absolutism not congenial to our law-making traditions. In *Kent v. Dulles*, 357 U. S. 116, 128-129, we refused to impute to Congress the grant of "unbridled discretion" to the Secretary of State to issue or withhold a passport from a citizen "for any substantive reason he may choose." *Id.*, at 128. Where the liberties of the citizen are involved, we said that "we will construe narrowly all delegated powers that curtail or dilute them." *Id.*, at 129. The Director of Selective Service described the "delinquency" regulations as designed "to prevent, wherever possible, prosecutions for minor infraction of rules" during the selective service processing.⁷ We search the Act in vain for any clues that Congress desired the Act to have punitive sanctions apart from the criminal prosecutions specifically authorized. Nor do we read it as granting personal privileges which may be forfeited for transgressions which affront the local board. If federal or state laws are violated by registrants, they can be prosecuted. If induction is to be substituted for these prosecutions, a vast rewriting of the Act is needed. Standards would be needed by which the legality of a declaration of "delinquency"

⁷ "The escalation of the United States military involvement in Vietnam increased the draft calls, and there was an upsurge of public demonstrations in protest. Some of these protests took the form of turning 'draft' cards in to various public officials of the Department of Justice, the State or National Headquarters of Selective Service System, or directly to local boards. By agreement with the Department of Justice, registrants who turned in cards (as contrasted to those who burned cards) were not prosecuted under section 12 (a) of the Military Selective Service Law of 1967, but were processed administratively by the local boards. In many instances, the local boards determined that a deferment of such registrant was no longer in the national interest, and he was reclassified 1-A delinquent for failure to perform a duty required of him under the Act, namely retaining in his possession the Registration Card and current Notice of Classification card." Hershey, *Legal Aspects of Selective Service* 46-47 (1969).

could be judged. And the regulations, when written, would be subject to the customary inquiries as to infirmities on their face or in their application, including the question whether they were used to penalize or punish the free exercise of constitutional rights.

Reversed.

MR. CHIEF JUSTICE BURGER concurs in the result reached by the Court generally for the reasons set out in the separate opinion of MR. JUSTICE STEWART.

MR. JUSTICE WHITE joins the opinion of the Court insofar as it holds that Congress has not delegated to the President the authority to promulgate the delinquency regulations involved in this case.

APPENDIX

Under the Selective Service Act of 1917, 40 Stat. 76, if a registrant failed to return his questionnaire or to report for physical examination, he was mailed a special order directing him to report for military service at a specified time. The registrant became a member of the service on the date specified in his order; any refusal to obey that order subjected him to prosecution under military law for desertion. "Since in most instances the delinquent registrant would never receive the order, due to not being in contact with his local board, he would normally acquire the status of a deserter without having any knowledge of his induction." Selective Service System, Enforcement of the Selective Service Law 13 (Special Monograph No. 14, 1950). Thus, enforcement of the 1917 Act rested principally with the military, with court martial being the main weapon of enforcement.

In passing the Selective Training and Service Act of 1940, 54 Stat. 885, Congress specifically ended the practice of subjecting delinquent registrants to military jurisdiction immediately upon receipt of their orders to report. Rather, § 11 of the Act provided that no registrant should be tried in a military court for disobeying selective service laws until he had been actually inducted, vesting criminal jurisdiction until such time in the United States district courts.

No mention was made in the 1940 Act of "delinquency" or "delinquents." These terms were first introduced by the Selective Service regulations issued under the Act, 32 CFR, c. VI (1940 Supp.), which prescribed various duties for registrants and defined a "delinquent" as one who failed to perform them:

"A 'delinquent' is . . . (b) any registrant who prior to his induction into the military service fails to

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perform at the required time, or within the allowed period of given time, any duty imposed upon him by the selective service law, and directions given pursuant thereto, and has no valid reason for having failed to perform that duty." 32 CFR § 601.106 (1940 Supp.).

Furthermore, the Regulations provided definite procedures for processing delinquents: after giving them notice of their suspended delinquency, 32 CFR § 603.389 (1940 Supp.), and after investigating those suspected charges, 32 CFR § 603.390 (1940 Supp.), the Selective Service System provided for two possible dispositions:

On the one hand—

"If the local board is convinced that a delinquent is not innocent of wrongful intent, or if a suspected delinquent does not report to the board within 5 days after the mailing of the Notice of Delinquency . . . , the board should report him to a United States District Attorney for prosecution under section 11 to the Selective Service Act." 32 CFR § 603.391 (a) (1940 Supp.).

On the other hand—

"If the board finds that the suspected delinquent is innocent of any wrongful intent, the local board shall proceed with him just as if he were never suspected of being a delinquent." 32 CFR § 603.390 (a) (1940 Supp.).

The February 1942 amendments to the Regulations added a provision by which local boards would advise the United States Attorney in the exercise of his discretion not to prosecute those who had violated the selective service laws:

"If it is determined that the delinquency is not wilful, or that substantial injustice will result, the

local board should encourage the delinquent to comply with his obligations under the law and, if he does so or offers to do so, should urge that any charge of delinquency against him or any prosecution of him for delinquency be dropped." 32 CFR § 642.5 (1938-1943 Supp.).

This process was called the "enforcement procedure of education and persuasion." Selective Service System, Enforcement of the Selective Service Law, *supra*, at 1-3.

"The first steps of the board were to try educating and persuading [the delinquent] to comply, but if such failed his case was referred to the United States attorney for further education and persuasion, or if such also failed, for prosecution." Selective Service System, Organization and Administration of the System 241 (Special Mono. No. 3, 1951).

If it was determined that the delinquency was "wilful" or that for any reason the United States Attorney should not exercise his discretion not to prosecute, the registrant was given an opportunity to avoid prosecution by "volunteering" for induction.

"[T]he registrant could volunteer for induction from any classification, not just I-A, any time he so desired, and if he was a delinquent under prosecution such volunteering was often allowed from any stage of the proceedings." *Ibid.*

This procedure made it possible for the boards to siphon into military service some delinquents who might otherwise have traveled to jail:

"Since the purpose of the [selective service] law is to provide men for the military establishment rather than for the penitentiaries, it would seem that when a registrant is willing to be inducted, he should not be prosecuted for minor offenses committed during

his processing." Selective Service System, Legal Aspects of the Selective Service System, at 42 (1963).

In November 1943, a new and substantially different set of regulations were issued. These regulations did not rely upon a delinquent's "volunteering" for induction; instead they provided for reclassification of deferred or exempted delinquents into classes available for service, 32 CFR § 642.12 (a) (1943 Supp.), and provided for their priority induction without regard to the order of call established elsewhere in the regulations, 32 CFR § 642.13 (a) (1943 Supp.).

A deferred or exempted registrant who was reclassified into a class available for service was accorded the procedural rights of personal appearance and appeal to which he would otherwise have been entitled. 32 CFR § 642.14 (a) (1943 Supp.). In the case of a registrant who was not reclassified as a result of his delinquency, the local board could "reopen" the classification and accord rights of personal appearance and appeal "at any time before induction." 32 CFR § 642.14 (b) (1943 Supp.). If the local board determined that the registrant "knowingly became a delinquent," however, it was directed to decline to reopen the registrant's classification. *Ibid.*

With respect to those registrants who were given appeal rights under § 642.14, the appeal board would determine if they had "knowingly" become delinquents. If they had, they were to be retained in a class available for service. If they had not, they were to be "classified on appeal in the usual manner" and their status as delinquents was to be "disregarded." 32 CFR § 642.14 (c) (1943 Supp.).

The purpose of these regulations was "to prevent delay in the induction of apprehended delinquent registrants." Selective Service System, Enforcement of the Selective

Service Law, *supra*, at 56 (1950). More important, the Service recognized that the procedure had little to do with the statutory exemptions delineated by Congress but, rather, was punitive in nature:

"[T]he Selective Service Regulations concerning delinquents were amended again on November 1, 1943. The purposes of these changes were . . . *To provide for the administrative penalty to a delinquent of prompt classification into Classes I-A, I-A-O or IV-E, as available for service, in addition to the existing criminal sanction.*" (*Ibid.*) (Emphasis added.)

The regulation of November 1, 1943, purportedly drew its authority from § 3 of the 1940 Act. 54 Stat. 885. Nothing in that section, however, gives the Service powers of punitive reclassification and accelerated induction. Moreover, to the extent that § 3 has been so construed, it would conflict with the spirit of § 4 (a):

"The selection of men for training and service under section 3 . . . shall be made in an impartial manner, under such rules and regulations as the President may prescribe, from the men *who are liable for such training and service* and who at the time of selection are registered and classified *but not deferred or exempted.*" 54 Stat. 887 (emphasis added).

The delinquency provisions under the 1940 Act expired in March 31, 1947. The provisions issued under the 1948 Act are discussed in the text, *supra*.



SUPREME COURT OF THE UNITED STATES

No 71.—OCTOBER TERM, 1969

David Earl Gutknecht,	}	On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.
Petitioner,		
v. United States.		

[January 19, 1970]

MR. JUSTICE HARLAN, concurring.

I join the Court's opinion with the following observations. First, as I see it, nothing in the Court's opinion prevents a selective service board, under the present statute and existing regulations, from classifying as I-A a registrant who fails to provide his board with information essential to the determination of whether he qualifies for a requested exemption or deferment. Section 1622.10 of 32 CFR provides that: "In Class I-A shall be placed every registrant who has failed to establish to the satisfaction of the local board, subject to the appeal herein-after provided, that he is eligible for classification in another class." I assume, of course, that under this regulation a board has no authority to keep a registrant classified I-A once it has information which justifies some lower classification.

Second, I think it entirely possible that consistent with our opinion today the President might promulgate new regulations, restricted in application to cases in which a registrant fails to comply with a duty essential to the classification process itself, that provide for accelerated induction under the existing statute. However, in order to avoid those punitive features now found to be unauthorized under existing legislation, any new regulations would have to give to a registrant being subjected to accelerated induction the right (like a person held in

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civil contempt) to avoid any sanction by future compliance. In other words, while existing legislation does not authorize the use of accelerated induction to punish past transgressions, it may well authorize acceleration to encourage a registrant to bring himself into compliance with rules essential to the operation of the classification process.

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David Earl Gutknecht,	}	On Writ of Certiorari to the
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[January 19, 1970]

MR. JUSTICE STEWART, concurring in the judgment.

I do not reach the question whether Congress has authorized the delinquency regulations, because even under the regulations the petitioner's conviction cannot stand. After the petitioner's local board declared him delinquent, he had 30 days as a matter of right to seek a personal appearance before the board and to take an appeal from its ruling. Yet the board gave him no chance to assert either of those rights. Instead, it ordered him to report for induction only five days after it had mailed him a notice of the delinquency declaration.

The local board thus violated the very regulations it purported to enforce. Those provisions seek to induce Selective Service registrants to satisfy their legal obligations by presenting them with the alternative prospect of induction into the armed forces. The personal appearance and appeal are critical stages in the delinquency process. They enable the registrant declared delinquent by his local board to contest the factual premises on which the delinquency declaration rests, to correct his oversight if the breach of duty has arisen merely from neglect, or to purge himself of his delinquency if his violation has been willful. In any event, the regulatory objective is remedial. The board's authority to reclassify a registrant based on his delinquency and to accelerate his induction is analogous to the age-old power of the

courts to pronounce judgments of civil contempt. In each case the subject of the order "carries the keys . . . in his own pocket" to the termination of the order's effect.¹

The Government has advanced the civil-contempt analogy not only in this case, but also in others before the Court both this Term and last.² Such an interpretation of the delinquency regulations comports with the view of the agency charged with their administration—that their purpose is to provide young men for the armed services, not the penitentiaries.³ It comports, as well, with the regulatory scheme itself, under which the local board may reopen its classification of a delinquent registrant without regard to the usual restrictions against such action,⁴ and remove the registrant from delinquency status at any time, even after it has ordered him to report for induction.⁵

¹ Cf. *Shillitani v. United States*, 384 U. S. 364, 368-372; *Green v. United States*, 356 U. S. 165, 197-198 (BLACK, J., dissenting); *Penfield Co. v. SEC*, 330 U. S. 585, 590; *United States v. United Mine Workers*, 330 U. S. 258, 330-332 (BLACK and DOUGLAS, JJ., concurring in part and dissenting in part).

² The Government has spelled out the analogy in its briefs in *Oestereich v. Selective Service Local Bd. No. 11*, 393 U. S. 233; *Breen v. Selective Service Local Bd. No. 16*, post, p. —; *Troutman v. United States*, No. 623, cert. pending; and the present case. See also Griffiths, Punitive Reclassification of Registrants Who Turn in Their Draft Cards, 1 Sel. Serv. L. Rep. 4001, 4010-4012.

³ L. Hershey, Legal Aspects of Selective Service 47 (1969).

⁴ 32 CFR § 1642.14 (b) (Supp. 1969); cf. 32 CFR § 1625.2 (Supp. 1969).

⁵ 32 CFR § 1642.4 (c) (Supp. 1969). Of similar import is the board's authority, before notifying the local United States Attorney that a registrant has failed to report for induction, to wait 30 days if it believes it may be able to locate the registrant and secure his compliance. 32 CFR § 1642.41 (a) (Supp. 1969).

The civil-contempt interpretation draws further support from the historical development of the law of Selective Service delinquency. In the First World War, one who failed to fill out his questionnaire

Accordingly, even though the regulations seem to say that such reopening and removal lie within the discretion of the local board,⁶ the Government agrees that the board would abuse its discretion if it refused such remedial relief to a registrant who breached his duty inadvertently or carelessly, or who sought to correct the breach, even if originally willful, and to return to compliance with his obligations.⁷ But the Government

was simply inducted into the military, and his failure to report for duty led to a court-martial for desertion. See *United States ex rel. Bergdoll v. Drum*, 107 F. 2d 897, 899. By the Second World War, when the precursor of the present delinquency regulations first appeared, 32 CFR §§ 601.106, 603.389-603.393 (Supp. 1940), the law provided compliance procedures for registrants who offered to satisfy their obligations, even after their boards had referred their cases to the United States Attorneys for prosecution. 32 CFR § 642.5 (Supp. 1938-1943). However, from 1943 on, the regulations required denial of reopenings for knowingly delinquent registrants. 32 CFR § 642.14 (b) (Supp. 1943). Under the present regulations even a registrant whose delinquency is willful may redeem himself before his local board. Surely this historical progression demonstrates that whatever may have been the punitive nature of the draft law's initial response to the delinquency problem, its present character is remedial: recalcitrant registrants are handled in civilian rather than military proceedings, and receive an opportunity to recant even where their dereliction has been purposeful.

Such an understanding of the delinquency regulations underlies recent decisions in the federal courts, *e. g.*, *Wills v. United States*, 384 F. 2d 943, 945-946, cert. denied, 392 U. S. 908; *United States v. Bruinier*, 293 F. Supp. 666, including those upholding the constitutionality of the regulations, *e. g.*, *Anderson v. Hershey*, 410 F. 2d 492, 495-496, n. 10, 498, nn. 15-16, 499, cert. pending; *cf. United States v. Branigan*, 299 F. Supp. 225, 236-237; but see *United States v. Eisdorfer*, 299 F. Supp. 975, 984-989, prob. juris. pending.

⁶ See 32 CFR §§ 1642.4 (c), 1642.14 (b) (Supp. 1969).

⁷ The Government qualifies its interpretation by implying that a local board might not abuse its discretion in refusing removal in the case of a registrant who sought in good faith to correct his breach of duty *after* the board had issued its order to report for induction. But that limitation has no application in the present case, where

argues that in this case the petitioner cannot avail himself of these provisions in the delinquency regulations, because he made no effort to correct his delinquency. The fact is that the petitioner's local board never gave him a chance to purge his delinquency. It declared him a delinquent on December 20, 1967, sent him a notice to that effect the next day, and five days later ordered him to report for induction, more than two weeks before the expiration of the petitioner's time to seek a personal appearance or take an appeal.⁸ In these circumstances the petitioner's failure to seek his local board's advice on what he should do, as suggested by the delinquency notice, does not detract from the force of his attack upon the validity of his criminal conviction.⁹

The Government also argues that the petitioner was not prejudiced by the local board's departure from the prescribed regulatory routine because when he was declared delinquent he was already classified I-A. But the Court of Appeals noted that the petitioner's induction date was advanced as a result of the declaration,¹⁰ and the Government concedes that since the petitioner was only 20 years old at the time, it is unlikely that he would

the local board improperly issued the order to report before the petitioner had a chance to bring himself into compliance. In *Troutman v. United States*, *supra*, where the Solicitor General has conceded that the local board erred in refusing to remove the petitioner's delinquency after he sought to bring himself into compliance with his Selective Service duties, nearly six months intervened between the board's declaration of delinquency that the petitioner sought to cure and its order to report for induction that gave rise to the prosecution for failure to submit to induction.

⁸ 32 CFR §§ 1642.14, 1624.1 (a), 1624.2 (d), 1626.2 (c) (1) (Supp. 1969).

⁹ Cf. *McKart v. United States*, 395 U. S. 185, 197.

¹⁰ 406 F. 2d 494, 496.

have been called at such an early date had he not been declared a delinquent. That the petitioner might eventually have been called—by no means a certainty, given the variations in draft calls and the possibility that he might subsequently have qualified for a deferment or exemption—does not mean he cannot complain that he was ordered to report for induction earlier than he should have been.¹¹

Finally, it is said that the petitioner had no right to a personal appearance before the local board and an appeal from its ruling because its delinquency declaration did not entail his removal into Class I-A from some other category. Since the petitioner was already I-A, the argument runs, his local board never "reclassified" him; it just shifted him from a lower to the highest category within the I-A order of call.¹² Neither logic nor policy supports such a narrow reading of the regulations. Section 1642.14 specifically provides for a personal appearance and appeal not only upon a "reclassification into" I-A, but also upon a "classification in" that category.¹³ The regulation thus covers precisely those registrants who are already "classified in" Class I-A, and whose declaration of delinquency automatically elevates them to the head of the order of call, as well as those registrants who are not yet in I-A, and who must be "reclassified into" that category before they can be put at the top of the list. The regulation, recognizing that the status of the registrant prior to his being declared delinquent and placed at the head of the order of call is

¹¹ *United States v. Baker*, 416 F. 2d 202, 204-205; *Yates v. United States*, 404 F. 2d 462, 465-466, rehearing denied, 407 F. 2d 50, cert. denied, 395 U. S. 925; *United States v. Smith*, 291 F. Supp. 63, 67-68; *United States v. Lybrand*, 279 F. Supp. 74, 77-83.

¹² See 32 CFR § 1631.7 (a) (Supp. 1969).

¹³ Cf. 32 CFR §§ 1642.12, 1642.13 (Supp. 1969).

irrelevant to the delinquency process, ensures that all registrants declared delinquent will enjoy the same rights of personal appearance and appeal without regard to their previous status.

Because the challenged regulations afford the petitioner procedural rights that his local board never gave him a chance to exercise, I would reverse the judgment of conviction.

